



Missouri Department of Natural Resources

Clean Water Commission Water Protection Program

Meeting Minutes

January 4, 2006

MISSOURI CLEAN WATER COMMISSION MEETING
January 4, 2006
Holiday Inn South County Center
6921 South Lindbergh Blvd.
St. Louis, MO
MINUTES

Present

Thomas A. Herrmann, Chairman, Missouri Clean Water Commission
Davis D. Minton, Commissioner, Missouri Clean Water Commission
Kristin M. Perry, Commissioner, Missouri Clean Water Commission
Cosette D. Kelly, Commissioner, Missouri Clean Water Commission
Ron Hardecke, Commissioner, Missouri Clean Water Commission

Edward Galbraith, Director of Staff, Missouri Clean Water Commission
Bill Bryan, Counsel, Missouri Clean Water Commission
Marlene Kirchner, Secretary, Missouri Clean Water Commission

Leo Alderman, EPA, Kansas City, Kansas
Mike Alesandrini, Department of Natural Resources, St. Louis, Missouri
Andrew Appelbaum, Department of Natural Resources, St. Louis, Missouri
Bob Bacon, ERC, Jefferson City, Missouri
George Barbee, CAS Construction, Kansas City, Missouri
Bob Bernard, Fulton, Missouri
Diane Bernard, Fulton, Missouri
Geri Blakey, City of Moberly, Moberly, Missouri
Kurt Breeze, Festus-Crystal City Sewage Commission, Festus, Missouri
Robert Brundage, City of Moberly, Jefferson City, Missouri
John Carter, The Doe Run Company, Viburnum, Missouri
David Casaletto, Ozarks Clean Water Company, Kimberling City, Missouri
Allen Decker, MRWA, Gray Summit, Missouri
John Delashmit, EPA, Kansas City, Kansas
Tom Diehl, St. Louis, Missouri
Cindy DiStefano, Dept. of Conservation, Columbia, Missouri
Bob Fuerman, MAWC, Chesterfield, Missouri
Doug Garrett, Department of Natural Resources, Jefferson City, Missouri
Ana Grace, Women's International League for Peace and Freedom, St. Louis, Missouri
Frank Hackmann, Sonnenschein, Nath & Rosenthal/RCGA, St. Louis, Missouri
Ted Heisel, MO Coalition for the Environment, St. Louis, Missouri
Duane Kelly, Independence, Missouri
Kim Knowles, MO Coalition for the Environment, St. Louis, Missouri
Richard Laux, Department of Natural Resources, Jefferson City, Missouri
Lance LeComb, MSD, St. Louis, Missouri
John Lodderhose, MSD, St. Louis, Missouri
Laura Lohen, Confluence Greenway, St. Louis, Missouri

Beth Martin, Washington University Environmental Clinic, St. Louis, Missouri
Refaat Mefrakis, Department of Natural Resources, Jefferson City, Missouri
Ken Midkiff, Sierra Club, Columbia, Missouri
Kevin Mohammadi, Department of Natural Resources, Jefferson City, Missouri
Richard Moore, Department of Natural Resources, Jefferson City, Missouri
Nancy Morgan, Department of Natural Resources, Jefferson City, Missouri
Susan Myers, MSD, St. Louis, Missouri
Earl Pabst, Department of Natural Resources, Jefferson City, Missouri
Caitlyn Peel, HBA, St. Louis, Missouri
Kevin Perry, Forrester Group, Jefferson City, Missouri
Kurt Riebeling, Department of Natural Resources, St. Louis, Missouri
Lorrane Robison, Spanish Lake, Missouri
Ted Salveter, City Utilities, Springfield, Missouri
Candy Schilling, ERC, Jefferson City, Missouri
Eugene Schmittqous, Hutchinson Salt, St. Louis, Missouri
Phil Schroeder, Department of Natural Resources, Jefferson City, Missouri
David Shanks, Boeing, St. Louis, Missouri
Dan Sherburne, MO Coalition for the Environment, St. Louis, Missouri
Tom Siegel, Department of Natural Resources, St. Louis, Missouri
David Smith, Festus-Crystal City Sewage Commission, Festus, Missouri
Steve Stewart, Upper White River Basin Foundation, Branson, Missouri
Trent Stober, MEC Water Resources, Columbia, Missouri
Stephen Stoll, City of Festus, Festus, Missouri
F. Michael Struckhoff, Department of Natural Resources, St. Louis, Missouri
Michael Swoboda, Missouri Stream Team #888, Jennings, Missouri
Jeff Theerman, MSD, St. Louis, Missouri
Roger Walker, Jefferson City, Missouri
Mary West, City of Moberly, Moberly, Missouri
Jamee Wheeler, Coalition for the Environment, St. Louis, Missouri
Betty Wyse, ERC, Jefferson City, Missouri

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1 BEFORE THE DEPARTMENT OF NATURAL RESOURCES
2 CLEAN WATER COMMISSION
3 STATE OF MISSOURI

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amendments to those minutes, I'd like to approve them and

enter them into the record. Do we have any --

3 COMMISSIONER PERRY: I move that the minutes
4 be approved as presented.

5 VICE-CHAIRMAN MINTON: Second.

6 CHAIRMAN HERRMANN: Moved and seconded. Any
7 discussion? Declare the minutes approved and enter them into
8 the record. Under Tab 2 in the agenda booklet is a 2006-2007
9 regulatory agenda, and Ed Galbraith will make the primary
10 staff recommendations.

11 MR. GALBRAITH: Good morning, Commissioners.

12 CHAIRMAN HERRMAN: Good morning.

13 MR. GALBRAITH: In your packet, you have
14 several items. The orders of business that I want to do
15 under this tab today are three. I want to get your approval,
16 in general, of a regulatory agenda as set forth. Two, I want
17 to talk in detail -- some detail about the 303(d) list and
18 get your -- get some specific input from you on that. And
19 the third, I'd like to get your permission to move forward
20 with the Administrative Hearing Commission rule draft that
21 you have under that tab.

22 You should have received -- after you got your
23 books, you should have received a supplemental insert. It's
24 a version of this table that is the -- the rulemaking agenda.
25 The first version that we sent you failed to have these
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1 headers at the top that told you what the yeses and nos, and
2 the commas mean, so you may want to refer to that.

3 On December 19th, we presented this material
4 to the Clean Water Forum, and we got some input from them on
5 that, and I will kind of give you the -- the highlights of
6 the results of that meeting as well. But first, before we do
7 that, I'd like to ask Phil Schroeder to come to the podium
8 and brief you on the status of the 303(d) list, and present a
9 recommendation for a path forward. What two things that you
10 may want to refer to during this discussion are the FY04-06
11 303(d) list critical path, it's he's a one-page list of
12 action items and dates associated with it. And then I have a
13 handout that I'm going to pass -- pass out now, so Phil.

14 MR. SCHROEDER: I guess what I'll speak from
15 this morning in talking about the 303(d) list critical path
16 is what you have in your packet on Page 165, which is a list
17 of steps that we consider as necessary in order to promulgate
18 a rule, both on looking at the methodology, or perhaps making
19 revisions to the methodology on compiling the 303(d) list,
20 and then later moving through a rulemaking to promulgate the
21 list itself.

22 In that table, if you want to call it that, it
23 has three segments that we'll talk about; the emergency rule
24 for listing methodology, the draft order of rulemaking on a
25 303(d) list, and a final order of rulemaking on the 303(d)
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1 list. It provides a date as to when we think that if things
2 move fairly smoothly, those steps can be accomplished. We
3 also provided a column in that table to sort of help you
4 understand how many days it takes to accomplish each one of
5 those tasks.

6 And then along the far right side of that
7 table, you'll find a critical timeline, basically these are

8 timelines that are either established by departmental policy,
9 Commission directive, or by rule or statute. So those are
10 timelines that we must -- must meet. We cannot be flexible
11 in terms of going over or going under whatever the case may
12 be for those dates. What we have laid out here is the fact
13 that if the Commission would be able to give us a directive
14 on how to proceed on moving towards the next 303(d) list, we
15 would look to get that directive today.

16 So this starts -- this critical path, this
17 timeline that we're presenting, starts today. And if you're
18 unable to give us a directive on moving forward, then these
19 timelines, of course, may be affected by that. The first
20 stage, as I said, would be looking at revising the listing
21 methodology itself. That comes as a suggestion because we
22 have learned through our stakeholder discussions and through
23 our discussions with EPA that there are concerns with respect
24 to how the methodology guides us in developing a 303(d) list.

25 EPA has enumerated several things to us. We
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1 were able to have a meeting with them and sit down and
2 discuss items. I don't have a list of all issues before me
3 right now, but to give you a flavor of some of the issues
4 that they have with the methodology, one being that we have
5 an exclusionary clause in there for data of a certain age.
6 We also have exclusions for data sets that are not of a
7 certain size.

8 And as you go through the methodology, there
9 are certain other statements within the methodology that sort
10 of confines -- confines the staff into what data to
11 consider in looking at waters and defining their condition.
12 EPA has stated, and this is what's stated in their most
13 recent publication of methodology guidance, is that you
14 shouldn't be exclusionary in how you consider data. You
15 should consider, in their guidance, it says all data. So
16 therefore, there should be -- if there are exclusions, and
17 they do recognize that there are circumstances by which staff
18 should exclude certain data.

19 In order to do that, you have to represent --
20 you have to show that the data are not representative of the
21 water's condition. It may be because of age. It may be
22 because we don't have a substantial data set to be able to
23 get a clear picture as to what -- or be able to meet some
24 statistical test, if you will, to show us scientifically that
25 the water is of a certain condition.

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1 But the fundamental difference between what
2 the Commission's methodology says and what EPA is telling us
3 we must do is that we should consider all data sets. And if
4 we exclude any, we should have a scientifically-based reason
5 why we exclude it. The methodology just categorically
6 excludes it because of age. And so when we move forward in
7 developing the 2004 list, we did exclude some data sets. And
8 if we continue to move forward on the path that we're on and
9 bring to you a list that we've already developed through our
10 stakeholder discussion on using the -- or the Commission's
11 methodology, it's very likely that EPA will place waters onto
12 the list for us in the end. When we finally submit the list

13 to EPA, they will simply take it upon themselves to consider
14 all of the other data that was excluded, and add waters back
15 to the list. So the question that's before us is whether or
16 not that's something that we want to proceed to allow them to
17 do, or put them in a position of doing.

18 Anyway, if we move forward with the
19 methodology and changing it, we would try to bring approved
20 changes to the methodology to the Commission in March at
21 their March Commission meeting. We would begin, then, based
22 on the requirement of the rule, to go through a public
23 comment period on the changes in the methodology that would
24 require 60-day comment period on that. And then once the
25 responses to the comments were devised, we would try to get

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1 those in order to be able to meet a special session before
2 the Clean Water Commission in June of 2006. So it would take
3 us -- in accordance with this schedule, it would take us
4 until June in order to just address the issues with regard to
5 the methodology.

6 Following that point we'd be able to quickly
7 recompile the list, if you will, and get a new compiled list
8 to the Commission, hopefully, by September of 2006. At that
9 point, if they do approve the new listing, then we would move
10 toward the rulemaking process itself, which of course as it
11 starts with developing a regulatory impact report, that's a
12 new requirement for all rules promulgated by the department.
13 That itself requires a 60-day comment period. So we would
14 have to go through that process.

15 So our next approval by the Clean Water
16 Commission to file the rule following -- in other words, we'd
17 present the regulatory impact report along with the new
18 proposed listing in January of 2007. Then from that point
19 forward, the Secretary of State's office prescribed
20 methodology -- prescribed procedure for rulemaking kind of
21 takes control, if you will, in terms of the timelines. It
22 takes us down to the final order of rulemaking date of May of
23 2007 as being really the first reasonable time at which we
24 think we can present something to the Clean Water Commission
25 as a final order of rulemaking on an actual list.

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1 And then you follow on down to the time frame,
2 it would look like we would actually send EPA our final
3 effective list sometime in September of 2007. And I
4 mentioned to you that we feel that this -- this schedule is
5 somewhat optimistic. It's doable, but it relies on things
6 going fairly smoothly, and we get the answers we need when we
7 ask for them, we get guidance, we get -- we make decisions on
8 a timely manner. But it's doable, and we're certainly
9 willing and able to move along that path.

10 What you also have in front of you is a
11 timeline which kind of looks further down the road, if you
12 will, in terms of future listing. Because one of our major
13 concerns right now is that we get back on schedule with
14 EPA in submitting these lists on a timely basis. And they're
15 required every other year, every even numbered year on
16 April 1st. So we're already, of course, way behind on the
17 2004 list. With the 2006 -- April 1st, 2006, deadline coming

18 up fairly rapidly, we're going to miss that as well. We have
19 to do something to get us back on schedule, and it's going to
20 have to be something -- maybe just slightly short of
21 extraordinary, I guess, but we need to think about that very
22 carefully, because at some point, the criticism is going to
23 get extremely, extremely dire.

24 So what we're proposing here is a way that we
25 can do that. Let's get -- let's take care of the

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1 methodology, let's get square with EPA, if you will, in terms
2 of how this listing must be done so that they don't, in the
3 end of things, add waters to our list that we can all agree
4 on those. And let's move toward a combined 2004/2006 list
5 that can get us back into -- somewhat on schedule. Somewhat.
6 2008 has a good chance, 2006 is probably going to be late,
7 even if -- no matter what we do today.

8 But I think if we do -- to combine 2004/2006
9 list, and also keep in mind of 2008 deadline is coming before
10 us, and having a methodology that we can agree with EPA on, I
11 think the 2008 list would come on time.

12 Now, one of the things that the critical path
13 indicates is that the list is actually late, by the problem
14 we're trying to propose in this path is that EPA, as they've
15 done here just recently, publishes new guidance following
16 each listing cycle. And in a case of this last publication
17 of theirs, it came in July of 2005, that's more than a year
18 past the deadline of the last list. So you're already well
19 into -- well into the cycle of getting the next list prepared
20 when their guidance comes out for how that year's listing has
21 to be done.

22 What we need to do is somehow get in agreement
23 with EPA on how does their guidance affect our listing
24 process, because we aren't able, in our rulemaking
25 procedures, to start from the date that they publish their

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1 latest guidance, go through the collection of the data,
2 analysis of the data, go through the rulemaking on the list,
3 and be able to meet, or get a list published by our next
4 deadline, which is going to be less than a year away. Our
5 rulemaking process, when you add in the regulatory impact
6 report, and everything else required, is a year, maybe year
7 and a half.

8 So what we need to have, and this really comes
9 from EPA, is knowing from them at the date that the last
10 listing is due to them on April 1st of the even numbered
11 year, what are the criteria, what is the must-dos in order to
12 get the next list compiled. We need to know that then.
13 Having them provide to us something in the middle of that
14 process that says, well, you have to consider this now, is
15 really throwing us off.

16 And that's what this is basically trying to
17 show us is that with -- we either have to do one of two
18 things. We either need to get with EPA to have them publish
19 something much sooner in terms of guidance for that listing
20 year, or we need to change our rulemaking process, or we need
21 to eliminate the rulemaking process, whatever. But we
22 can't -- we can't -- we don't have enough time after that --

23 that time -- after EPA's guidance comes out. I see a
24 question brewing.

25 COMMISSIONER PERRY: Isn't it nice that you
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1 can watch the wheels grind. There seems to be some
2 implication in what you said that the methodology, if we pass
3 that, and that methodology agrees with EPA's, that the list
4 will be approved, that we approve, will then be approved by
5 EPA. Although I think history tells us in 2002, I don't
6 believe the methodology had anything at all to do with the
7 fact that EPA redid our list. Am I correct?

8 MR. SCHROEDER: Well, yeah, we can't -- can't
9 always guarantee that just because we work with EPA on a
10 methodology up-front that they're going to approve a list in
11 the end, obviously, but I think we stand a much better
12 chance, obviously.

13 COMMISSIONER PERRY: And I feel your pain, you
14 know. I feel the fact that this has to be coordinated just
15 makes a lot of common sense, and definitely something that
16 should be done, but I just wanted to point out that
17 (inaudible) good this all does us.

18 CHAIRMAN HERRMANN: Well, I have an objection,
19 and perhaps opposed to EPA. As you recall the age and the
20 amount of data necessary to classify a stream for some
21 particular impairment was the result of -- or resulted in
22 quite a bit of conversation and discussion in this group.

23 And some of the things that brought that about
24 was some streams were impaired for mercury based on one fish
25 tissue sample in a stream that might be 169 -- or 186 miles

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1 long, 136 miles long, but there was one fish sample taken at
2 one location, and the mercury content of that fish tissue
3 sample -- that single fish tissue sample was marginal, but
4 yet it was put in -- put on the list over our objection for
5 mercury contamination.

6 MR. SCHROEDER: Right.

7 CHAIRMAN HERRMANN: And I don't think that's
8 scientifically defensible data.

9 MR. SCHROEDER: Yeah.

10 CHAIRMAN HERRMANN: I think that should be
11 excluded as not enough data to classify that stream for a
12 mercury contamination.

13 MR. SCHROEDER: I think that a lot can be
14 gained, and I think EPA would echo this, too, not in changing
15 what we put on the list, but changing in how we -- how we
16 define what goes on the list. And more specifically, how we
17 define what gets excluded in terms of data. It's just not
18 very well explained.

19 In previous efforts, you know, we've excluded
20 data, but we didn't explain why very well. And one of the
21 things, I think, we can do very much better in terms of --
22 it's just you gave a very good example, Chairman Herrmann,
23 that if we say that the water shouldn't be on the 303 data
24 list because the data is not sufficient, we should explain
25 our reasons why it's not sufficient.

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1 CHAIRMAN HERRMANN: I disagree. It should be

2 on a 305(b) list, not on a 303(d) list, because we haven't --
3 and EPA hasn't ascertained that that stream is impaired. We
4 think it is, and that's the purpose of the 305(b) list is
5 those streams which are defined as suspicious of being
6 impaired but need more study to prove it, those go on a
7 305(b) list, and we haven't -- we haven't, with EPA's
8 guidance or insistence, have not made good and full use of
9 the 305(b) list, in my opinion.

10 MR. SCHROEDER: Yeah, well, I know you said
11 you disagree, but from what I hear you say, I think we agree.
12 I mean, we -- we believe that many of the waters, when
13 they're assessed, when there's insufficient data to -- to not
14 conclusively say through scientific process that they're
15 impaired, but there's some indication that they may be, there
16 is room in the 305(b) report for that information.

17 CHAIRMAN HERRMANN: That's correct. That's
18 correct.

19 MR. SCHROEDER: And there's another category
20 for those waters that would indicate that those waters, to
21 the public that read about our assessments, that those waters
22 have some indication there that they may be impaired, but we
23 don't have enough data to say conclusively.

24 CHAIRMAN HERRMANN: That's right. We objected
25 to the unknown pollutant category that EPA put on several

0015 streams in that 2002 list. And it was our insistence at the
1 time that if it's an unknown pollutant, then by the guidance
2 of the Federal Clean Water Act, it should be on the 305(b)
3 list, not the 303(d).

4 MR. SCHROEDER: Right. And I think we can
5 prevail in those -- in those decisions with EPA if we do a
6 little bit more in terms of defining our reasons for making
7 those conclusions, to simply say that one sample point is not
8 enough. And most cases it will be not enough, but we need to
9 say why one sample point.

10 CHAIRMAN HERRMANN: Particularly if it's five
11 and seven years old.

12 MR. SCHROEDER: Right.

13 CHAIRMAN HERRMANN: That's not representative
14 of today's.

15 MR. SCHROEDER: And I can't speak for EPA, and
16 I shouldn't, but some of the things they've reflected to us
17 is that , yeah, in many cases, the data that's five or seven
18 years old may not be reliable in terms of being
19 representative. But you need to explain why.

20 CHAIRMAN HERRMANN: Yeah.

21 MR. SCHROEDER: In some cases, though, they
22 say it may be. And what you need to make sure is that it
23 isn't that special circumstance where it could be or is, and
24 be able to say with some reasonable length why it's not

0016 representative, rather than just saying it's seven years old,
1 therefore it's not representative. You should say it's seven
2 years old, there's showing of variations in the quality of
3 that water prior to that seventh year ago, and it just -- you
4 cannot prove scientifically that that's what the condition is
5 today. I mean, you just have to say more than just it's
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7 seven years old. That's what EPA is reflecting to us.
8 CHAIRMAN HERRMANN: Okay. One other question.
9 You sent to all of us a listing of, I think, seven waters
10 which were recommended to be taken off the 303(d) list
11 because of changing conditions, because sampling in recent
12 times has shown that that impairment no longer exists. Do we
13 have an answer from EPA on those seven streams?

14 MR. SCHROEDER: Well, I don't know what seven
15 streams you're talking about, but we have, and I recall
16 discussions with EPA on this matter. And our response from
17 them is that if the water's on the 303(d) list, and you now
18 have water quality data that show the water meeting water
19 quality standards, then our process, there's two things you
20 can do to get it off the list.

21 One, is you can wait for the next listing
22 cycle to be completed, and therefore the water drops off
23 because your new data analysis indicates that it's no longer
24 impaired, doesn't belong on the list, and when the new list
25 comes out, it's not on there. The other way that it comes

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1 off is you do a TMDL. Now, it sounds ridiculous, and we've
2 had discussions with EPA about this, about having to do a
3 TMDL, despite the fact that water quality data show that it's
4 not impaired.

5 But as long as it's as it's on a list, the only
6 door they're giving us to get out of that box is a TMDL. And
7 we've written TMDLs, which basically show the waste load
8 allocation being whatever it is today. We're not reducing
9 the loads, we're just saying that, well, you've
10 got -- because it meets standards today, we've got to make
11 sure that the load doesn't result in a noncompliance later.

12 Now, we don't necessarily agree with having to
13 take that step, but that's the response we got from EPA, and
14 so that's how we're proceeding to get some of the waters off
15 the 1998, or now the 2002, list. Rather than waiting until
16 the next listing cycle is completed in doing the (d) listing
17 then, we're doing the TMDL as they're asked or prescribed by
18 EPA.

19 CHAIRMAN HERRMANN: Wow, do you remember those
20 letters, Ed? I remember East Fork and the Tebo
21 is one, and Blackbird Creek was another, and I've forgotten
22 the other five, but the request was made to EPA to remove
23 these from the 303(d) list, but my question was do we have an
24 answer.

25 MR. GALBRAITH: I think the answer was that --

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1 the answer is no. We have to go through -- we have to go
2 through the TMDL process regardless of what the data show.

3 MR. SCHROEDER: Now, here's another little
4 twist in that scenario. If you read the statute, the statute
5 says clearly a TMDL shall not be done where waters meet water
6 quality standards. So we furthered our discussion with
7 EPA and said that we can't do a TMDL. You're asking us --
8 you're telling us that's the only route we have to go, but we
9 can't by statute do that. So what we're doing is writing a
10 TMDL. Looks, smells, tastes like a TMDL, but it's not
11 labeled a TMDL.

12 But we're submitting that to EPA as our
13 analysis, if you will, showing that the waters meet water
14 quality standards, presenting a waste load allocation that
15 represents no -- no future load reductions are needed, and
16 they're willing to accept that. So it's a way out of the
17 box, but it's sort of an unusual way. But it's the only way
18 that EPA, at this point, is really guiding us to get it done.

19 I'll also add this: The reason why we're
20 going for the with the TMDL rather than just shelving the
21 water to just say, well, let's wait until the next listing
22 cycle has ended, because some of these waters come up as a
23 deadline in the consent decree of requirement to have them
24 completed by a date prior to the next listing being
25 completed. So we have to have some action taken. So we

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1 can't shelve it, we've got to do something, so the only
2 opportunity we have is to do this so-called TMDL. I think it
3 will work. It's just an odd way of going about doing our business.

4 VICE-CHAIRMAN MINTON Phil, my only comment is
5 without getting into discussion about all the issues of
6 303(d) listing today, obviously the most important thing that
7 we have to do is deal with the methodology first. I think to
8 avoid a huge discussion on the date by which it, you know,
9 the revised listing methodology document has to be approved
10 or come before the Commission, the issues that you brought up
11 today, if nothing else, without even -- just notify us, you
12 know, as you get those issues, so we can kind of start
13 thinking them through ourselves.

14 And like you've mentioned today, the time --
15 or the age of the information that were used. Chairman
16 Herrmann said that was a very contentious point in the last
17 methodology document, because as a Commission, I think we
18 were trying to send a signal -- information that's 15 or 20
19 years old is not relevant, an at least need -- or while it
20 may be relevant, at least it needs to be upgraded with more
21 timely information to determine the legitimacy of the
22 position of that -- for one of the stream to be on a --
23 either a 305 or 303.

24 So I think we were trying to send a message as
25 well as clean up, if you will, the document. So if we knew

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1 ahead of time, as you-all become aware of these issues, if
2 we're made aware of these issues, we can kind of start
3 discussing them and let the audience begin to feel where
4 we're at, and it won't be such a huge monumental task on the
5 date that we have to do it.

6 Because the last thing we want to do is get to
7 this timeline and all of a sudden not be able to come to
8 agreement or consensus as a Commission, turn around and have
9 to have -- you know, send it back to the drawing board, if
10 you will. That pushes the timeline nonworkable. We need to
11 kind of, you know, have an open forum all along, if you will.

12 MR. SCHROEDER: Right.

13 VICE-CHAIRMAN MINTON: Because to come up to
14 the last day, I don't know how many of you were here for the
15 last methodology document, but it was a horrendous battle,
16 and -- and we -- yeah, we worked it out eventually, but

17 nevertheless, it was probably not the best and the cleanest
18 way to have done it, and probably as EPA said, we need to
19 make some revisions. Okay. Let's kind of plan ahead, if you
20 will.

21 MR. SCHROEDER: I -- I really appreciate that.
22 That's good information, good advice. And what I'd
23 appreciate further from the Commission is their directive
24 to allow us, and to quickly and as prescribed by this
25 schedule, get with EPA, propose some modifications to the

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1 with respect to not using data that's not representative of
2 the water quality conditions, but yet addresses EPA concerns
3 that we consider all data, that allows us to exclude that on
4 the basis that we provide substantial reasons why it must be
5 excluded, based on such things as what Chairman Herrmann has
6 described.
7

8 CHAIRMAN HERRMANN: Yeah, we approved a
9 methodology some several months ago. When was that?

10 MR. SCHROEDER: Oh, gosh. I think it was
11 November of two thousand --

12 COMMISSIONER PERRY: Three, four.

13 MR. SCHROEDER: Four.

14 COMMISSIONER PERRY: Yeah, it's over a year.

15 CHAIRMAN HERRMANN: Do we have other
16 objections from EPA other than that age and size of data?

17 MR. SCHROEDER: Yeah, they listed several
18 things. There's some things that we do in our statistical
19 analysis that needs to be further explained. You know, most
20 of what they tell us isn't very specific to say you have to
21 include this data or that. It just says you need to explain
22 yourselves a little better as to why you're excluding certain
23 data.

24 CHAIRMAN HERRMANN: To make the methodology
25 acceptable, that November 2004 or whenever it was that we --

0022 MR. SCHROEDER: Uh-huh.
1

2 CHAIRMAN HERRMANN: We approved the original,
3 that has to be massaged or rewritten in part, not in total,
4 right?

5 MR. SCHROEDER: Absolutely.

6 CHAIRMAN HERRMANN: All right.

7 MR. SCHROEDER: In fact, we've already taken
8 some steps to redraft some sections, which we feel needs
9 further rationale, if you will, as to why we have to exclude
10 certain data sets, why we have to exclude certain data of
11 certain ages and things like that.

12 CHAIRMAN HERRMANN: When would you anticipate
13 that to be done?

14 MR. SCHROEDER: It's already done, sir. We
15 can present something to you tomorrow and to EPA. What we
16 thought we'd want to do first is make sure we understood that
17 the Commission was going to direct us or agree with us on
18 this critical path that we're presenting today. And if you
19 say today proceed on, just as you said, looking at that
20 methodology and tweaking it, not revamping the whole thing, but
21 just tweaking it to address some of EPA's concerns about

22 explaining the exclusion of certain data sets as to when and
23 why that could happen and should happen, we're already there.
24 Staff have already put that together based on
25 our discussions in meetings with EPA. We're ready to either

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1 present that to you or to EPA, however you want to do that,
2 whatever order seems fine with you. But we're ready to move
3 because we know if we're going to meet this March 1st date,
4 we want to present something to you -- at the next Commission
5 meeting in terms of getting your approval on the methodology
6 changes. We need to be moving quickly, and ...

7 CHAIRMAN HERRMANN: Is it possible to get
8 EPA's review and approval prior to presenting it to the
9 Commission, Bill? If you were to get that expeditiously?

10 MR. ALDERMAN: Yes, we haven't seen it yet, but
11 I would say we probably ought to give it a very quick
12 turnaround, because I know Chuck and Rebecca have been
13 talking about this, and the areas that we'd like to see
14 revised, so that we've -- we've discussed, but what it looks
15 like now we haven't seen. We'll give it a quick turnaround.

16 CHAIRMAN HERRMANN: Okay. That would appear
17 to be the best way to proceed is before we approve anything
18 to get EPA's acceptance and approval, and then come to us
19 with a rewrite.

20 MR. SCHROEDER: Okay. That's what we have
21 down here, just revise it with EPA's guidance and come right
22 straight to the Clean Water Commission in March.

23 CHAIRMAN HERRMANN: Okay. Okay.

24 MR. SCHROEDER: And I think that will get us
25 on a path of really resolving the issues that's holding us up

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1 right now and getting a list put together.

2 CHAIRMAN HERRMANN: Anything else, Phil?

3 MR. SCHROEDER: Not on the 303(d) list.

4 CHAIRMAN HERRMANN: Okay. I think we have
5 some requests to address the Commission on this subject.
6 First one from Robert Brundage.

7 MR. BRUNDAGE: Good morning, Mr. Chairman.

8 CHAIRMAN HERRMANN: Good morning.

9 MR. BRUNDAGE: Members of the Commission. I
10 haven't had a whole long time to think through this whole
11 process, but one thing that bothers me is if we proceed with
12 an emergency rule on the three -- or on the listing
13 methodology, you know, how meaningful will some of these
14 changes be, and what kind of impact will that have down the
15 road when EPA reviews our list and are they going to
16 rubberstamp our list this time just because we went through
17 the listing methodology and revised it.

18 If you remember back our last time our list
19 went to EPA, they rejected portions of the list, and I think
20 they added 26 water bodies, so there's 26 times that they
21 disagreed with your judgment at that point in time. When we
22 went through the listing methodology that was approved in a
23 rule, that was a very difficult process, as Commissioner
24 Minton discussed, and there were legitimate reasons to come
25 up with that listing methodology the way it is.

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1 Just thinking out loud, is there a different
2 way to approach this? Should we just proceed with the 303(d)
3 list, through a rulemaking right now without changing the
4 listing methodology, and submit together with the list, just
5 a narrative statement that flushes out justification and
6 reasoning behind our listing methodology as it stands in rule
7 today? Is that a possibility? And is that going to achieve
8 us the same thing in the end because EPA is going to do what
9 they want to do with the list anyway, and we don't have to go
10 through the pain of changing our listing methodology.

11 Now, as a stakeholder in the public, I'm not
12 opposed at any time to make reasonable changes to a listing
13 methodology, but to do so through an emergency rulemaking,
14 just because we think we may have to jump through a hoop like
15 that, I'm not sure if that's the best approach in this
16 manner.

17 VICE-CHAIRMAN MINTON: I concur with your
18 point, Robert. The thing that I think that -- that it might
19 bring to light would be any glitches that were found after
20 the fact of the way the methodology document was handled. I
21 think we would have to see legitimate reasons for altering
22 the methodology document before the Commission would approve
23 any changes.

24 I think simply because we go through this
25 critical rulemaking process, it will give the opportunity for
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1 the Commission to learn of any mistakes that we made and take
2 any additional steps forward to improve the process. But to
3 say that we're going to wholesale -- change that document
4 after what we went through the last time, I find that very
5 difficult to accept. I don't really know that I see a whole
6 lot wrong with just reviewing the process.

7 And maybe the easiest way do it that is
8 through the emergency rule. It would step it up -- because
9 it seems like we always have to have some sort of incentive
10 or crisis situation before we move forward, and this is, you
11 know, this is another one of those crisis timeline situations
12 again, so maybe this might be a reasonable way to approach
13 it. But I understand your point, and it's well made.

14 COMMISSIONER PERRY: I wonder if the
15 difference between what gets listed following the present
16 methodology, which was worked on carefully. Of course, it
17 went through sort of a reverse process first. Everybody kind
18 of came together and exploded, and then they went back and
19 they worked together. And they came up with something that
20 everybody was pretty pleased with.

21 Now, the water bodies that are going to be
22 listed under that methodology versus the water that will be
23 listed under a methodology that has to be recreated because
24 for some reason the burden of proof, it seems to me, on what
25 data should be considered, has been shifted from we have to

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1 now prove that data that we thought would be bad data, we
2 have to go back and somehow scientifically prove that the bad
3 data is bad data, making the burden on us, rather than
4 initially as we have under our present methodology, we look
5 at it, and we say, hey, this data looks really old, we want

6 some better data before we consider putting something on this
7 list.

8 But my bottom line is what's really the
9 difference? How many -- you know, we had 21 added, and I
10 don't think any of those 21 were added for these reasons.
11 Are we just spending a whole lot of time spinning our wheels
12 over methodology, when actually we should be spending that
13 time concentrating on getting good data to decide what should
14 and should not be on the list? And how much resources are we
15 wasting on the methodology that should be spent on good
16 scientific data?

17 VICE-CHAIRMAN MINTON: Well, I think, not to
18 beat the horse, but I think the point is the methodology
19 described to staff and the public at large that, you know,
20 going into it, this Commission, in order to approve a list,
21 is going to have to have reasonable and timely and
22 documentable, you know, provable information before we're
23 going to put a stream on a list, or a segment of a stream on
24 a list. I think it clearly defines where we stand before
25 we're going to approve -- before we're going to approve a

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1 303(d) list.

2 Now, EPA may do with the list what they will,
3 but at least from this state and this Commission's point of
4 view, we will do it the best way we know how to do it, and
5 while we may believe something should be on the 305 list as
6 opposed to a 303 list, you know, we can't control what EPA is
7 ever going to do with the list once it gets into any of their
8 hands. But I think one of the reasons why, and I don't want
9 to overlook the whole reason for, in my mind, the -- the use
10 of the methodology list, was to clearly and definitively
11 state to everyone these are certain standards that must be
12 met before we're going to put a stream on the list.

13 So I don't want to ever undermine the
14 credibility or the purpose of the methodology document. And
15 if we need to clearly, or more clearly, define what that
16 methodology states, then -- then so be it. But, you know,
17 that was the -- that was the guideline, if you will, that
18 gets us to where the list has got to be.

19 So I think before -- as I said awhile ago,
20 before we're going to go make wholesale changes to the
21 methodology, I feel like this Commission is going to have to
22 see a lot of just cause, because I think we tried to rain in
23 as best we could the indiscriminate action of putting a
24 stream on the list.

25 MR. BRUNDAGE: Well, I think you clearly

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1 understand my point that if we do go through a rulemaking,
2 there is no guarantee that EPA is going to approve our list
3 and like our listing methodology after we're even done with
4 it through an emergency rulemaking, so ...

5 COMMISSIONER PERRY: Can you answer my
6 question? Do you think that the list is going to look
7 significantly different?

8 MR. BRUNDAGE: I'm not qualified to answer
9 that question. Maybe John Ford would be, but ...

10 COMMISSIONER PERRY: Can anybody here tell me

11 that? Because are we wasting a lot of time talking about
12 something when we should be talking about scientific data?

13 MR. BRUNDAGE: Thank you for my comments.

14 CHAIRMAN HERRMANN: Thank you, Robert.

15 MR. SCHROEDER: In looking at what we've done
16 already in terms of tweaking the guidance or methodology,
17 that might result in different listing in the future, I would
18 say that it's likely not to change things too much from what
19 we already proposed. And what Mr. Brundage has already seen
20 in our 2004 efforts. What you're going to see different is a
21 lot more explanation as to why we excluded certain data from
22 being considered representative of the water conditions.

23 And you'll see those waters and that data
24 support a placement of the water in our 305(b) report under
25 the category that says we need to collect more data. Because

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1 one of the things we're going to have to show to EPA is that
2 there is some data that would suggest that the water may be
3 impaired. We need to look further into that. And when we
4 put it into the 305(b) report, I think it's under category
5 3(b), it says to everybody, including the Department, that we
6 need to start collecting more data here. And it's a way for
7 us to focus our monitoring and assessment efforts on things
8 that are likely to be impaired or may be impaired. So it's
9 a way of prioritizing our assessment efforts.

10 But the actual list itself, there may be a
11 couple waters -- few waters that come back on the list. I'm
12 not certain. But -- but there's good reason for excluding
13 these waters already from the 2004 list the proposed one. And
14 those reasons just need to be explained better. And I think
15 that from what my staff has done, John Ford and others, all
16 they need to do is present that reason in a more definitive,
17 more described -- explain better where those data sets aren't
18 really representative, and present that to EPA so they can
19 consider that and conclude with us that those data sets are
20 not representative of the waters.

21 COMMISSIONER PERRY: So do you believe that
22 the impact of revising the methodology we already have is --
23 is over on the impact is going to be a more clear 305(b)
24 list?

25 MR. SCHROEDER: Actually, the affect is that

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1 it gives something to EPA that will prevent them from putting
2 those waters on our 305 -- or 303(d) list. But rather,
3 allows them to understand and appreciate the fact that we see
4 and consider the data, and that we will also follow-up with
5 further data collection to insure that those waters are not
6 impaired, or whether they are -- if they are impaired by
7 further data collection, they'll get on the next list.
8 That's what they need to see, and I think that's what we all
9 need to see.

10 You know, people fear that because it comes
11 off the 303(d) list it gets ignored. Well, we need to show
12 to everybody that if it comes off the 303(d) list because
13 the data doesn't really tell us conclusively that it's
14 impaired, we still need to follow-up, and that's what the
15 305(b) list is for.

16 COMMISSIONER PERRY: Okay. Then I have my
17 final question is anything by revising this methodology and
18 going through a rulemaking process for that going to delay
19 the development of the 305(b) and the 303(d) list? Is this
20 being done simultaneously, or is it because we're going to
21 wait for this methodology to go back and analyze the data,
22 are we slowing ourselves way down?

23 MR. SCHROEDER: As we talk to EPA about the
24 changes we're going to propose to our methodology, to the
25 Commission's methodology, we will also be reflecting on how

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1 it might affect that 2004 list that we've already proposed.
2 And so when we come to the Commission in March with a revised
3 methodology, if you wish, we can give you sort of a peak in
4 the door of what that 2004/2006 list is likely to look like, if
5 you promulgate the emergency rule.

6 COMMISSIONER PERRY: I would like to know
7 that.

8 MR. SCHROEDER: Okay.

9 VICE-CHAIRMAN MINTON: I have one other
10 question before I make a motion to give you direction to move
11 on with the timeline. On an every other year basis, this is
12 a huge task, and by -- if you just look at the timeline by
13 which we have to go through, as you pointed out earlier, the
14 process is in itself stifling, just the process, without
15 hunting up the data to determine what should or shouldn't be
16 on the list.

17 In your estimation or in your opinion, is
18 there anything that we can do to expedite, no matter how
19 radical a change it is, is there anything that we can do
20 to where we can more easily stay on the time frame that --
21 that we're required to have for that -- or for that even
22 number year 303(d) list? You know ...

23 MR. SCHROEDER: Well, if we stay with the
24 notion that EPA is not going to change their ways of issuing
25 guidance halfway into the next listing year, and therefore

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1 we'd only have less than a year to promulgate a 303(d) list,
2 then we have to dispense with the need to go through a
3 rulemaking on the methodology changes. If -- if what
4 EPA prescribes as guidance causes us to have to revisit the
5 methodology. That's one thing.

6 I wish -- you know, I see the value, and I
7 appreciate the value in a rulemaking process for the 303(d)
8 list itself. We need to engage stakeholders. They need to
9 be fully informed and have every ability to influence that
10 list with the Commission. But I'm wondering if the
11 rulemaking process is the best process to do that, something
12 to consider there, too.

13 You know, we have open forum, open sessions
14 here before the Clean Water Commission. We have a lot of
15 stakeholder discussions on a lot of issues. There's probably
16 better methods to dialogue on what needs to be on a list
17 rather than going through a rulemaking process. I'm just
18 wondering how much value does that really add to the whole
19 process.

20 COMMISSIONER PERRY: Since you bring it up,

21 can you tell me how that's mandated currently? What sort of
22 changes would be required?
23 MR. SCHROEDER: Well, there was a statute that
24 mandates the 303(d) list be promulgated into rule. So it
25 would require a statutory change.

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1 COMMISSIONER PERRY: State statute?

2 MR. SCHROEDER: State statute, yes. And I
3 think Missouri is one of only a handful of states in the
4 nation that actually promulgate their 303(d) lists in
5 rulemaking. And the other states that go through a
6 promulgation process on their listing, they also are
7 challenged by making their submittal EPA on a timely basis.

8 (End of tape one, side one.)

9 CHAIRMAN HERRMANN: Hear from the other people
10 first.

11 MR. ED GALBRAITH: It would require legislative
12 action to change that. And I just -- I ran some numbers,
13 some totals on this, and I'll make a quick point. If you
14 look at all the actions that are -- are done by either the
15 Department or the Commission on here, it's about 250 days of
16 the total 634 days. If you look at all the required public
17 participation, the required rulemaking steps, it's about 345
18 days of activities.

19 COMMISSIONER PERRY: 345 days?.

20 MR. GALBRAITH: So, yeah, so it's -- as long as
21 the rulemaking requirement is there, the answer is no. There
22 is nothing we can do to pair this down significantly.

23 COMMISSIONER PERRY: And that's adding, like,
24 three months -- the difference -- the rulemaking is adding a
25 hundred -- I'm not sure I did the math right.

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1 MR. GALBRAITH: About a year.

2 MR. GALBRAITH: Yeah, 345 days.

3 CHAIRMAN HERRMANN: Okay. I'd like to hear
4 from Ken Midkiff, Sierra Club.

5 MR. MIDKIFF: Good morning, Commissioner. My
6 name is Ken Midkiff, I'm representing the Sierra Club. I
7 have three brief points. First of all, the 2004 list was due
8 on April 1st, 2004. Secondly, it's my understanding that
9 Missouri is the only state in the union that has not
10 submitted a 303(d) list.

11 CHAIRMAN HERRMANN: That's incorrect. Is that
12 not right, Leo?

13 MR. ALDERMAN: I think there's -- I'm not quite
14 sure what the status is today, but as about of, oh, two
15 months ago, there was three other states.

16 MR. MIDKIFF: Three others. Okay. I stand
17 corrected.

18 MR. ALDERMAN: They could be by today done, but
19 two or three months ago, there was others.

20 MR. MIDKIFF: I was told yesterday that we're
21 the only state. If Leo has better information, then I stand
22 corrected. And the final point is that according to the
23 schedule that Ed has outlined, the rulemaking for '04 and '06
24 would be submitted in '07. So the three -- the 2004 list --
25 or the '04 list will be three and a half years behind, the

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1 '06 list will be one and a half years late. That's
2 unacceptable.

3 COMMISSIONER PERRY: Can I ask you a question?

4 MR. MIDKIFF: Yes.

5 COMMISSIONER PERRY: You mentioned on these
6 states whether there's three who haven't doesn't -- isn't
7 really significant to my question.

8 MR. MIDKIFF: Just two, two states.

9 COMMISSIONER PERRY: My question is did all
10 those other states pass it without a methodology approved by
11 EPA because EPA was a year late on their methodology?

12 MR. MIDKIFF: That, I don't know.

13 MR. ALDERMAN: You used the word "approve". We
14 don't approve the methodology. We work with the state to try
15 to get an agreement whether the methodology would work, but
16 we do not approve or disapprove methodologies. And those
17 other states, I just don't know what they had.

18 COMMISSIONER PERRY: Well, it seems like we're
19 being pretty bogged down in trying to get a methodology that
20 everyone agrees upon, which makes sense, because you should
21 know what the rules are before you start the list. But the
22 fact that we're so delayed and all -- all or all except two
23 or however many other states seem to progress, would beg the
24 question, did they -- were they able to come up with a
25 methodology where we have not been? And if so, why?

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1 MR. MIDKIFF: And I don't -- again, don't have
2 the answer to that question. Thank you.

3 CHAIRMAN HERRMANN: I think it's a significant
4 condition to consider, though.

5 MR. MIDKIFF: Yes.

6 CHAIRMAN HERRMANN: Okay.

7 COMMISSIONER PERRY: Because you're being --
8 you're obviously implying that we're just dragging our feet.

9 MR. MIDKIFF: Yes.

10 COMMISSIONER PERRY: And I'm not sure
11 that's -- I'm not sure that's what we're doing here. I think
12 we've been talking about this out our geezoos for years and
13 not ignoring it, but actually trying to come to a good
14 consensus of a good methodology.

15 MR. MIDKIFF: I don't see any other way to
16 interpret three and a half years being late as other than
17 dragging your feet. Thank you.

18 CHAIRMAN HERRMANN: I think the 2002 list was
19 really the 2000 list. And that was strung out by the
20 addition of -- which Robert mentioned, 26 streams for no
21 apparent reason. No justification, no scientific
22 justification for putting those 26 streams on.

23 MR. MIDKIFF: Oh, there was plenty of
24 scientific justification --

25 CHAIRMAN HERRMANN: By our objection, they

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1 removed -- EPA removed 12 of those 26 streams that were
2 added.

3 MR. MIDKIFF: I must be in the wrong room, I
4 thought this was the Clean Water Commission. Thank you.

5 MR. ED GALBRAITH: If I may, just point out that I
6 think we're the only state that has to go through actually
7 two rulemaking processes to promulgate the list -- the
8 methodology and the list, so that's --

9 CHAIRMAN HERRMANN: Okay. Ted Heisel
10 wishes to address the Commission.

11 MR. HEISEL: Good morning. Good morning,
12 Commissioners. I just -- I think most of this has been said
13 already. I think we have sort of an untenable situation
14 where we have a state statute mandating that this be done by
15 rule, and as long as we're on a two-year schedule with EPA,
16 we're always going to be sort of wasting a lot of staff's
17 time, I think, trying to go through those procedures.

18 There are other procedural safeguards having
19 public comment periods, having open microphones before the
20 Commission stakeholder meetings that can solve a lot of the
21 issues without requiring us to go through this yearlong or
22 year and a half long rulemaking process. The Supreme Court,
23 prior to this statute being adopted, actually ruled that the
24 303(d) list doesn't have to be done by rulemaking under other
25 statutes. And so except for this one very specific

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1 provision, it was passed in 2002, if that was done away with,
2 basically we could go back to a nonrulemaking sort of
3 procedure.

4 I would suggest that maybe it's appropriate
5 for the Commission, if you see fit, to point out to the
6 legislature or the governor's office, that this is something
7 that's really bogging down DNR staff, causing problems, and
8 maybe this is something that needs to be looked at this
9 session.

10 COMMISSIONER PERRY: I'm surprised at your
11 response. I'm not necessarily agreeing with the premise, I'm
12 just surprised that -- normally your opinion is to put as
13 many safeguards in as possible. What are the safeguards that
14 you believe that would be in place if we removed the
15 rulemaking process?

16 MR. HEISEL: Well, I think you can still have
17 a public -- you can still put out a draft list, you can still
18 have a comment period, you just don't have to go through all
19 of the other machinations that take time along with the
20 rulemaking. And so, you know, put a draft list out, open it
21 up for public comment, have a stakeholder meeting. You can
22 do that a lot more quickly than actually going through the
23 statutory rulemaking process, I think.

24 COMMISSIONER PERRY: Would that be dropping
25 the fiscal impact requirement?

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1 MR. HEISEL: I guess -- I mean, you could
2 probably still do that, but yeah, I think if you took it out
3 of the rulemaking, that would not require the fiscal note.

4 VICE-CHAIRMAN MINTON: Do you think there's as
5 wide support across the board -- have you visited with other
6 stakeholders to determine the level of support that this
7 concept would have?

8 MR. HEISEL: No, I mean, I'd be curious to
9 hear from Robert or other business interests. I mean, it's

10 my understanding back in 2002, there was some unhappiness
11 about the 303(d) process. There was a group of stakeholders
12 that actually filed suit, which is when that ruling came down
13 in the Supreme Court that said it didn't have to be by rule.
14 But as that suit was progressing, actually the stakeholders
15 were successful in the legislature in getting that provision
16 passed, that said it does have to be by rule in the future.
17 I don't know how they feel today, whether they, you know,
18 changed their mind, and think now this is too cumbersome and
19 we're missing federal deadlines or not.

20 COMMISSIONER PERRY: Do you recall who that
21 group of stakeholders was?

22 MR. HEISEL: Well, the ones that filed suit
23 were the Missouri Soybean Association, I think it was AIM. I
24 don't want to say without -- Missouri Soybean Association was
25 the lead plaintiff, they're the name on that case, so ...

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1 COMMISSIONER PERRY: Wasn't that over the
2 listing of the Mississippi?

3 MR. HEISEL: Mississippi and Missouri, yeah.
4 I think Bill was counsel in that case, probably knows more
5 than I do.

6 COMMISSIONER PERRY: But that issue wasn't
7 necessarily the rulemaking process?

8 MR. BRYAN: The -- the factual issue that gave
9 rise to the case was the way that the Missouri and
10 Mississippi Rivers were added by the Commission at the last
11 meeting before the list was made final. And when that was
12 challenged in court, the legal claims that were raised had to
13 do with whether or not this should have been done in a
14 rulemaking. That was primarily what the lawsuit was about.

15 COMMISSIONER PERRY: Okay. Thank you.

16 CHAIRMAN HERRMAN: Thank you. Terry.

17 MS. SATTERLEE: May I be recognized?

18 CHAIRMAN HERRMANN: Yes, you may.

19 MS. SATTERLEE: I was the lawyer.

20 CHAIRMAN HERRMANN: I recognize you.

21 MS. SATTERLEE: My name is Terri Satterlee
22 , and I was the lawyer on these two cases that
23 you're talking about. I know Mr. Bryan is familiar
24 with it, but actually, there were more than just the fact the
25 Mississippi and Missouri -- do you want to hear the contents

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1 of the cases?

2 COMMISSIONER PERRY: That actually all came
3 about before I came on the Commission.

4 MS. SATTERLEE: Okay. Let me explain to you.
5 First of all, in the state it was the Soybean Association,
6 the Ag Council, I believe, Robert, and the AIM and Missouri
7 Chamber of Commerce. The issue was the state had recommended
8 not putting the Missouri and Mississippi on the list, and
9 there were a lot of agricultural nonpoint streams on the
10 list, which would have impacted TMDL development.

11 And by vote of the Commission, by one
12 Commissioner's amendment to the list, they put the Missouri
13 and Mississippi River on, and everybody voted unanimously for
14 it without any data to support it because constantly

15 throughout the process, it had been publicly noticed that
16 they would not be put on the list.

17 So the second piece was during discovery, and
18 I'm not mentioning any names. They're very well intended
19 workers, we learned that a lower staff person at MDNR was
20 told the list was too short and to add 30 nonagricultural
21 streams, which we believe had no data, at least they had no
22 data that was publicly recognized or publicly put forward.
23 So that's how this -- there was also a federal case along
24 this same line.

25 COMMISSIONER PERRY: I read that deposition,
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1 so I'm very familiar with it.

2 MS. SATTERLEE: So that's what really happened.
3 As I think people are still very weary as in -- would be in
4 the ag and in the industrial and municipal community with
5 regard to being sure they have a say, because there was
6 discussion at the time on the side of developing a
7 methodology without rulemaking, but the rulemaking went
8 through pretty -- with a pretty strong vote, I think, Bill,
9 if I'm not correct.

10 COMMISSIONER PERRY: So would a public comment
11 period without rulemaking safeguards be adding --

12 MS. SATTERLEE: I can't answer that because
13 there's so many stakeholders involved. I would agree with
14 Ted Heisel that, you know, you would have to go back to the
15 stakeholders and discuss it. It's pretty -- it's still
16 having its impact throughout the state on things you are
17 doing, so many of us who have old institutional memories are
18 very aware of what happened.

19 COMMISSIONER PERRY: Okay.

20 MS. SATTERLEE: Thank you.

21 MR. BRYAN: And of course, as that case points
22 out and the rulings from the various courts and what happened
23 in front of the Commission, this Commission is the ultimate
24 safeguard to prevent that kind of thing from happening again.

25 MR. STOBBER: Hello Commission, my name is

0044

1 Trent Stober with MEC Water Resources. I'd like
2 to echo Robert Brundage's suggestion that maybe this
3 methodology just needs to be addressed through a comment
4 letter back to EPA on the rationale, and I do believe there
5 was a -- you know, technically justified rationale for
6 writing the -- the data requirements and so forth for the
7 methodology document.

8 I mean, I believe that we all sat around a
9 room and went through that methodology document pretty
10 extensively, and flushed through a lot of the technical
11 issues with data set limitations and so forth. So I think
12 that the department probably has the justification to run
13 with the 2004 list the way it was derived, and if there's a
14 few minor issues that -- that can't be justified, then EPA,
15 as always, has the latitude to do what they see fit, I guess,
16 with -- with our -- our list, and I believe handling that
17 manner, at least addresses some of the time frame issues that
18 we have and gets us a 2004 list as soon as possible.

19 COMMISSIONER PERRY: Are you suggesting that

20 we proceed with the methodology we have with some minor
21 changes to make it successful, those changes not be
22 promulgated by rule?

23 MR. STOBBER: Or alternatively, just try to
24 address the -- the issues that EPA has with it. By the
25 sounds of it, it may be the majority of the issues with the

0045

1 methodology document, we can explain the technical
2 justification and just go forward as -- as is, and if there's
3 some of those issues that -- that can't be addressed, either
4 it's the Commission's purgative to direct staff to make those
5 changes or leave those remaining items in EPA's hands. As we
6 all recognize, they have that latitude anyway, and use it if
7 they see it -- think that it's appropriate.

8 CHAIRMAN HERRMANN: Thank you, Trent. Ed.

9 MR. GALBRAITH: I am quite sympathetic to --
10 I'm very sympathetic to what Robert and Trent have said. And
11 I -- it was not easy -- it's not easy for me to come before
12 the Commission and say, Commission, you -- you passed a
13 methodology, but before we do our list on that methodology,
14 we want to revise it again.

15 And my reason -- my main reason for doing so
16 is this: As you can see, we're -- we're going to overlap two
17 lists, and we're going to -- basically, if we do as Trent and
18 Robert suggest, which it's up to you, we'll do whatever,
19 we're going to be working on two lists at once. We're going
20 to be doing a 2004, and then we're going to be doing a
21 methodology and list for 2006. And just from a staffing
22 point of view, I would -- I would like to avoid that. If we
23 know this is ultimately where we're going any way, I would --
24 I would like to avoid having to do the orange line and just
25 go with the green line.

0046

1 And my second reason is I just -- I do believe
2 that there is -- while EPA does have the authority to change
3 the list, and they will do that whether we revise the
4 methodology or not, I do feel from my discussions with
5 EPA that the closer we try to get on the methodology, the
6 better success we'll have at pleading our case, or making our
7 points, or being successful at prevailing, rather than if we
8 start with two methodologies that are very different, we kind
9 of just sort of hand it over to them more -- in a more
10 haphazard way, and sort of seed the ground to EPA to make the
11 changes, and we don't have a -- we don't have a fundamental
12 basis on which to argue over this stream or that stream. So
13 those are my two points, and ...

14 COMMISSIONER PERRY: I -- you know, I was one
15 of those people way back when we had that first explosion
16 that said we have to have a good methodology because we got
17 to -- everybody's got to know the rules that we're playing
18 by. What concerns me is I thought EPA was invited to that
19 party.

20 We passed a methodology, and then they came up
21 with a new methodology of their own after ours, and now we're
22 needing to somehow revise that, meanwhile we've got all these
23 people out threatening us that we're way behind the eight
24 ball. And tell me how we can resolve this with the most

25 efficient use of resources to keep the water in the state of
0047

1 Missouri clean with the least amount of lawsuits and the
2 least amount of time wasted talking about whether the data is
3 scientifically defensible or not, and just come up with good
4 data and fix the problem.

5 MR. GALBRAITH: That is a tall order.
6 COMMISSIONER PERRY: Now what do I do.

7 MR. GALBRAITH: I'm not sure I have the magic
8 bullet for all of those. But those are the things -- those
9 are the exact three issues that were on my mind as we -- as
10 we put together the critical path in front of you. I don't
11 know that it solves all those problems. It won't put off
12 every lawsuit, it won't make the -- it won't make a
13 rubberstamp list from EPA, but I think it's the best
14 combination.

15 In defense of region seven, they don't -- they
16 don't revise the guidance from year to year. Okay. That's
17 done at headquarters. So even though they were at the table
18 last time, they don't control what -- what headquarters does,
19 so there's a certain element there that's out of the hands of
20 everybody in this room as well, so.

21 COMMISSIONER PERRY: I'm not trying to point
22 blame. But I'm saying my gosh, we're really having a problem
23 with the process here.

24 MR. GALBRAITH: Right.
25 COMMISSIONER PERRY: And then we have a new
0048

1 issue that came up, at least to my mind, came up first time
2 today was change something that was a result of a lawsuit in
3 2000, and perhaps not do the 303(d) list by rulemaking.

4 And if that is, in fact, a proposal, I'd like
5 to have some sort of group developed to discuss the pros and
6 cons and to maybe have a consensus on that, because we
7 learned a lesson when we developed this methodology was not
8 to have staff come up with an idea, everybody come here and
9 say, hey, we hate that, we don't like that. What we learned
10 was it is far better to get together and come up with an idea
11 that everybody likes, develop a working group first, and then
12 come to us and say, hey, we all agree, and this is something
13 good and we can go on now.

14 And I would like to have such a thing done
15 over whether we have a public consensus that perhaps there
16 needs to be a legislative change. And if we go to the
17 legislature and say everyone agrees we need to change this,
18 we will have a much better result, one would suspect, in the
19 legislature.

20 MR. GALBRAITH: Right.
21 COMMISSIONER PERRY: Rather than people
22 running around backwards.
23 MR. GALBRAITH: Okay.
24 COMMISSIONER PERRY: I don't know what to do.
25 MR. SCHROEDER: May I try to help you with
0049

1 answering that question?
2 COMMISSIONER PERRY: Tell me what to do.
3 MR. SCHROEDERH: As I mentioned earlier,

4 there's really two very challenging things in front of us
5 that really cause us to -- to stumble on the 303(d) list.
6 One is the rulemaking process itself. And I would suggest to
7 the Commission that from the staff's perspective, the Commission's
8 directive has as much force and influence on staff as any
9 law. I mean, it's -- it's -- you direct us to do something,
10 we must do it. It has the force of law in our minds, so keep
11 that in mind.

12 What it does is basically shifts the burden of
13 the work and trust, if you will, from Department to the
14 Commission. And that's just something that the audience has
15 to consider, with respect to that. The other challenging
16 aspect that we have is EPA's insistence on changing guidance.
17 And their time of doing that. And the way we can fix that is
18 that while we can't tell them when to publish it, we can
19 certainly be engaged with them as they develop their next
20 guidance.

21 What they do, and they've told me that this is
22 what they do, is at the end of every 303(d) listing cycle,
23 they begin evaluating each and every state that's produced a
24 303(d) list and try to determine where they've fallen short
25 on compiling a respectable or reasonable list. And then they

0050

1 incorporate solutions to those gaps, if you will, in the guidance. That's
2 where they focus. So they can't really begin discussions and
3 evaluations until after the 303(d) list deadline is over and
4 the 303(d) lists have been submitted by the states. But
5 there's no reason why we can't be at the table with them
6 looking at what their concerns are.

7 They don't generally just surprise us with the
8 guidance, they do some public participation of their own. We
9 need to be at the table with them when they look at the
10 guidance, look at the development that guidance. So when that
11 date comes of publication, even though it may be in the
12 middle of a listing year, we're already ready to hit the
13 ground running.

14 So if we're ready to hit the ground running on
15 that day, we don't have a rulemaking process to worry about,
16 but we have a Commission directive to engage the public and
17 do public participation, do public notices, whatever you feel
18 is important in that process, it will get done. It just
19 won't have all of the Secretary of State's, you know, Joint
20 Committee of Administrative Rules, Small Business Advisory
21 Groups, all that involved with the rulemaking process pulls
22 into the process.

23 COMMISSIONER PERRY: Except that right now the
24 303(d) list is being mandated by state statute.

25 MR. SCHROEDER: Yes, at this moment, now, if

0051

1 we want to change either one of those two processes, it's not
2 going to help us now because we've got a rule in place, and
3 it's the methodology. The methodology is in rule.

4 COMMISSIONER PERRY: Right, and my problem,
5 too, is that any challenge to any of the decisions we made,
6 if we don't make it on something that is based through a
7 rulemaking, it's one of those policies. You know, there's
8 also a state statute that says, you must make your decisions

9 based on a guidance document that has been promulgated by
10 rule.

11 So if we just sort of change this without
12 promulgating it by rule, then we're also subjecting ourselves
13 to lawsuit because it didn't follow that which we
14 promulgated. Now, I love the idea that everybody gets to the
15 table and works together from the get-go, so that we don't
16 keep running into these problems. And whatever directive you
17 think we need to give so that happens, I'd certainly like to
18 know what it is and I'll be happy to support that. In the
19 meantime, I don't see yet in this discussion some clear
20 direction for us to go that will be efficient.

21 MR. SCHROEDER: Right. If we prevail in going
22 through the schedule and the steps that we've presented in
23 that table, which means emergency rule on the methodology,
24 and if that prevails in being -- being acceptable as a
25 process for an emergency rulemaking, that's one way we can

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1 expedite that process.

2 COMMISSIONER PERRY: As you suggest here.

3 MR. SCHROEDER: Right. And that may not be
4 enough, although I haven't looked at the actual deadline,
5 that may not be enough to cause us to fail to meet the
6 every-other-year deadline, as long as we don't have to
7 promulgate the actual list itself as a rule. And I don't
8 think that falls under the 536 requirements. The
9 methodology, I understand your point, I think you're correct
10 that under Administrative Procedures Act, we would actually
11 have to promulgate that methodology into the rule, but why not
12 do that through emergency rulemaking?

13 COMMISSIONER PERRY: Yeah, yeah, I don't have
14 a problem with that part, which is what -- this is an
15 emergency rulemaking schedule, if I understand what Robert
16 said.

17 MR. SCHROEDER: Yes. And I'd like to comment
18 on Trent's suggestion. I might suggest that the Commission
19 make this decision in March, because what we can present
20 and what we're ready to present to you is that not only the
21 changes, the tweaks to the methodology, but our peek at
22 so to speak, what the 2004 list may look like.

23 You should be able to make a decision in March
24 that you don't want to change the methodology at all. You
25 want to go ahead and file the rule on the list as we've -- as

0053
1 it would be done through the current methodology. You can
2 make that decision then, if you want to. You may want to
3 make that decision if you are presented by staff, a picture
4 that shows that most of the waters that we propose to be on
5 the 2004 list is going to end up there anyway, with not much
6 more added based on our discussions with EPA about changing
7 our methodology.

8 Those -- any more that we're going to add,
9 you're just going to have to expect EPA's going to do that
10 for us. And if you're willing to accept that eventuality, it
11 may be reason to accept moving forward with doing the 2004
12 list. In fact, in that essence, you can just call it
13 2004/2006 list anyway. It's not going to have any -- it's

14 not going to have any --
15 COMMISSIONER PERRY: Impact.
16 MR. SCHROEDER: -- impact.
17 CHAIRMAN HERRMANN: Any guidance on that
18 procedure to present it to us in March?
19 MR. SCHROEDER: In March, what I'd like to --
20 VICE-CHAIRMAN MINTON: That's what it does.. right now,
21 isn't it, Phil?
22 MR. SCHROEDER: Pardon.
23 VICE-CHAIRMAN MINTON: That's what this does
24 right now, gives us that flexibility to make that decision in
25 March if we proceed on with the staff recommendation right
0054
1 now?
2 MR. SCHROEDER: The only thing we didn't
3 contemplate by -- in that, and this is what Commissioner Perry said was
4 present also, is that look into the crystal ball as to what that
5 list is going to look like if you adopt the changes. And
6 also, what would the list look like if we didn't. That way,
7 you can compare the affects of either approach.
8 COMMISSIONER PERRY: I'd like that
9 information. I don't know if I need to do that by motion.
10 VICE-CHAIRMAN MINTON: Is that too much
11 cumbersome on you to provide that?
12 MR. SCHROEDER: I don't think so. We already
13 have what exists today.
14 VICE-CHAIRMAN MINTON: Okay.
15 MR. SCHROEDER: As a 2004 submittal based on
16 the current methodology that's done. What we need to do is once we work
17 with EPA and what changes to make to the methodology, what
18 would it draw in terms of additional waters and present
19 that to you in March.
20 VICE-CHAIRMAN MINTON: Okay.
21 COMMISSIONER PERRY: And does it -- is it also
22 possible to have some presentation to us at that March
23 meeting on the implications of removing the rulemaking
24 process?
25 MR. SCHROEDER: For the list itself?
0055
1 COMMISSIONER PERRY: Yes.
2 MR. SCHROEDER: In other words --
3 COMMISSIONER PERRY: That's another issue
4 that's been brought up in this discussion, and I'd just like
5 to have some information on that, and I'd also like to have,
6 as I said, something that a group has developed, a proposal,
7 perhaps, to the Commission.
8 MR. GALBRAITH: We could certainly organize a
9 discussion on that and present it to the Commission in March.
10 COMMISSIONER PERRY: Wouldn't that be timely?
11 MR. GALBRAITH: That would be -- well, it would
12 be getting a little bit later in the session, but these
13 things have a way of taking on a life of their own, so who
14 knows what might happen.
15 What the -- another thing the Commission could
16 consider doing is directing staff merely to write a -- some
17 kind of a letter to -- to legislative leaders or the governor
18 just outlining the problem, and maybe not supporting a

19 change, but simply alerting them to the fact that we've got
20 this issue, and it requires -- it's an action that the
21 Commission can't deal with, but, you know, you're just
22 alerting them to the fact that the situation exists. And
23 maybe it's premature to talk about that.

24 COMMISSIONER PERRY: If we're going to write
25 something to them, I'd like to know what it is I want to

0056

1 propose that they do. And frankly, I'm not sure how I feel
2 about it, but I'd sure like to have something where some
3 working group, like we had on this methodology, because if I
4 remember right, by the time we had this, everybody was happy.

5 CHAIRMAN HERRMANN: I don't know about that.

6 COMMISSIONER PERRY: Well, just about.

7 MR. GALBRAITH: Well, then, perhaps for today, it
8 would be best --

9 COMMISSIONER PERRY: And I'd like to see
10 something developed about the -- this is pretty important
11 change. And before we go to the legislature and ask them to
12 make the change, I'd sure like to be able to say these are
13 the opinions that are out there, and the majority opinion is
14 very much in favor of this, and these are the reasons why,
15 rather than run across and say, hey, we have a problem here,
16 but we don't know what we're going to do about it yet.

17 MR. GALBRAITH: Okay.

18 COMMISSIONER PERRY: If that can be done by
19 March, we still have two months left in the legislative
20 session if it needs to be done then.

21 MR. GALBRAITH: That's true.

22 COMMISSIONER PERRY: If you come back in March
23 and say, hey, people don't think this is a good idea, I'd
24 like to know that, too.

25 MR. GALBRAITH: Okay.

0057

1 COMMISSIONER PERRY: Can that be done?

2 MR. GALBRAITH: That can be done. You bet.

3 CHAIRMAN HERRMANN: You need a motion?

4 MR. GALBRAITH: A motion would be good.

5 CHAIRMAN HERRMANN: Okay.

6 COMMISSIONER PERRY: Okay. Then I move
7 that -- well, do we take -- is this the issue on the table
8 fist?

9 VICE-CHAIRMAN MINTON: Yes.

10 COMMISSIONER PERRY: Do I first have to move
11 that we approve this?

12 CHAIRMAN HERRMANN: Yes.

13 VICE-CHAIRMAN MINTON: You want that guidance
14 though?

15 COMMISSIONER PERRY: Okay. And my 303(d)
16 thing should be a separate issue, should it not?

17 VICE-CHAIRMAN MINTON: Yes.

18 CHAIRMAN HERRMANN: You want emergency.

19 COMMISSIONER PERRY: I move that we approve
20 this water protection program 303(d) list critical plan as
21 the staff has presented it to us.

22

23 VICE-CHAIRMAN MINTON: Second.

24 CHAIRMAN HERRMANN: Moved and seconded. Any
25 discussion? I take that as approval by everyone, so the
0058
1 motion will pass. And further --
2 VICE-CHAIRMAN MINTON: And then did you want
3 to make a separate motion?
4 CHAIRMAN HERRMANN: Okay. Please call for the
5 vote, Marlene.
6 MS. KIRCHNER: Commissioner Kelly.
7 COMMISSIONER KELLY: Yes.
8 MS. KIRCHNER: Commissioner Minton.
9 VICE-CHAIRMAN MINTON: Yes.
10 MS. KIRCHNER: Commissioner Perry.
11 COMMISSIONER PERRY: Yes.
12 MS. KIRCHNER: Commissioner Hardecke.
13 COMMISSIONER HARDECKE: Yes.
14 MS. KIRCHNER: Chairman Herrmann.
15 CHAIRMAN HERRMANN: Yes.
16 COMMISSIONER PERRY: Now I have another
17 motion. My second motion is that I would like to instruct
18 staff to bring to this Commission a recommendation and a
19 justification for that recommendation of whether they think
20 it's important or effective -- I'm sorry, I'm not exactly
21 sure how to word this motion.
22 MR. GALBRAITH: Whether it's a good idea
23 and enjoys wide state support.
24 COMMISSIONER PERRY: Whether it's a good idea
25 or not to have a rulemaking under the 303(d) list. And if
0059
1 not, what other safeguards could be put in place to make the
2 process more effective and yet still protective of everyone's
3 interest.
4 MR. GALBRAITH: Okay.
5 CHAIRMAN HERRMANN: Through the stakeholder
6 process.
7 COMMISSIONER PERRY: Through the stakeholder
8 process.
9 CHAIRMAN HERRMANN: Okay.
10
11
12 CHAIRMAN HERRMANN: Any
13 discussion? Or I'm sorry, second?
14 COMMISSIONER HARDECKE: Second.
15 CHAIRMAN HERRMANN: Moved and seconded. Any
16 discussion? Want a role call on this one, Bill? Oh, okay.
17 If there's no objection, we'll consider it a motion passed.
18 MR. GALBRAITH: Okay. To the rest of the item,
19 it may be in the interest of time, what I had planned on the
20 agenda was to have individual staff come up and talk about
21 blocks of these rules that you have on these -- on these
22 four -- three or four pages. Perhaps in the interest of
23 time, why don't we just see if there's any questions.
24 This doesn't really -- I guess I should clarify on this, this
25 is a list of everything that we have, that we know about.
0060
1 And it doesn't mean that all of these things
2 are going to proceed at an equal pace this year, and some may

3 not even make it out of the discussion phase this year.
4 There is a list of stakeholder groups that was approved by
5 the Clean Water Forum, and there are eight of them. Funding
6 staff and resources, that's a stakeholder group that I will
7 lead. Water quality effluent limits, effluent-dominated
8 streams, waivers to disinfect, that will be head up by our
9 permits group.

10 Number three is federal drinking water rules.
11 That's actually a drinking -- as it says, it's not something
12 this Commission needs to worry about. Number four,
13 anti-degradation policy, which Phil will head that up.
14 303(d) list, obviously Phil will be heading that one up.
15 Unclassified streams, wetland classification, tiered aquatic
16 life use, that will be Phil. And then another permitting
17 one, the under twenty-two five flows, which was a Commission
18 directive, the lagoon policy, another Commission directive,
19 and then the -- the eighth one is continue authorities.

20 In addition, we'll probably also have a group
21 on nonpoint source plan. So I don't -- I don't know that we
22 need to go through these rule by rule. Perhaps I just could
23 ask if there's any questions on any particular one.

24 CHAIRMAN HERRMANN: Some people asked me is
25 this a priority list. And I said, no, it's not listed as

0061
1 priority, it's just listed as a list of subjects.

2 MR. GALBRAITH: No, I think the -- I think the --
3 the priorities are reflected on this list of stakeholders
4 groups --

5 CHAIRMAN HERRMANN: Yes.

6 MR. GALBRAITH: -- that the -- that the Clean
7 Water Forum helped us identify. So the list -- this list
8 itself, the first one, is not a priority list.

9 CHAIRMAN HERRMANN: They're not one, two,
10 three, four as listed, but they are equal in priority. Okay.

11 MR. GALBRAITH: I don't know that I need any -- I
12 mean, if the Commission wants to bless this or -- or approve
13 it in some way, that would be fine. Otherwise, I don't know
14 that any action really needs to take place on this.

15 CHAIRMAN HERRMANN: We don't need any motion.

16 MR. GALBRAITH: Okay.

17 CHAIRMAN HERRMANN: Right, Bill? Okay. Thank
18 you.

19 MR. GALBRAITH: Thank you.

20 CHAIRMAN HERRMANN: Proceed to Tab 3 in the
21 agenda booklet, whole body contact recreation use on creeks.
22 And Phil is up for staff recommendation.

23 MR. SCHROEDER: Thank you, Chairman Herrmann.

24 At the September 7th meeting last year, the Commission -- or
25 the staff presented to the Commission proposed -- or the

0062
1 final order of rulemaking for their vote on a number of
2 revisions to the water quality standards. Among those
3 revisions were whole body -- or designations for whole body
4 contact recreational use on a number of classified water
5 bodies throughout the state.

6 There were four waters that drew special
7 attention, which as a result of that attention, the Clean

8 Water Commission asked staff to seek further comment on the
9 potential for and existence of whole body contact
10 recreational uses on these -- these waters. Those waters
11 were Coon Creek in Randolph County, River Des
12 Peres and Maline Creek in St. Louis County, and
13 the Mississippi River from the St. Louis area down to its
14 confluence with the Ohio River.

15 As directed by the Commission, we posted
16 notices in a number of different papers throughout the state
17 centering in the areas of these streams, and they were posted
18 in late October and afforded a 30-day comment period in
19 which we asked for additional information from anybody who
20 might have it with respect to the uses -- recreational uses
21 on these water bodies. That public comment period ended on
22 November 28th.

23 We are coming to you today to present those
24 comments that we had received along with our recommendation
25 as to how to proceed from this point forward with respect to

0063

1 the whole body contact recreational use designations. Now,
2 the Commission's vote on September 7th with respect to the
3 final order of rulemaking has removed the uses of whole body
4 contact recreation from all four of these waters, and
5 therefore what became effective as rule on December 31st of
6 2005 will show that these waters do not have a whole body
7 contact recreational use designation.

8 What we're considering here today is whether
9 the Commission wants to direct staff to effect the use
10 designations in the next water quality standards revisions
11 that will be coming in the future. What you have in your
12 packet is information on all four of these streams, and
13 they're divided by a green separator page, and I'm going to
14 talk about what's between those separators in just a second.

15 I wanted to kind of lay a little groundwork as
16 to how the committee made its decision with respect to the
17 comments. We, of course, primarily reflected very closely on
18 the Commission's protocol that was adopted for doing use
19 attainability analyses for whole body contact recreation.
20 And the primary information that was presented in those use
21 attainability analyses were depth measurements where the
22 protocol specifies that any water that has at least a meter
23 depth would be rendered as attainable for whole body contact
24 recreation, or has a average overall depth of a half meter.

25 The other thing that we considered was the

0064

1 fact that doing a use attainability analysis on a whole body
2 contact recreational use is a little different than what you
3 do on other uses. As we've discussed many times at past
4 Commission meetings, whole body contact recreation or
5 swimming is a presumed use. In other words, that use by --
6 under the Clean Water Law or under the Clean Water Act --
7 Federal Clean Water Act is presumed to exist until shown
8 through a use attainability analysis that it doesn't.

9 And one of the things that the review
10 committee and the department reflected on constantly as it
11 reviewed this information is whether or not the information
12 presented to us was successful in rebutting that presumption.

13 And that's different than the way we treat other use
14 designations. In other words, we would not necessarily
15 designate a secondary contact recreational use or an
16 industrial use of some kind to a water until information was
17 presented to us that the use actually existed or was
18 occurring, or that the use was intended to be put to that
19 water. So that's something to remember as we go through our
20 discussions. We're trying to rebut a presumption that the
21 use exists. In the -- between the green separator
22 pages, you'll find our internal review committee that
23 consists of departmental staff that reviewed the information
24 and our recommendation, as long as -- and as well as some
25 past history of our evaluations under the use attainability

0065

1 analysis. Following that, you'll find the actual newspaper
2 advertisements that were placed in various newspapers around
3 the state.

4 You'll find following that, a summary sheet of
5 the comments that we'd received on that particular water
6 body, and then lastly what you'll find are the actual
7 comments that were submitted to the department and those that
8 were considered in making our recommendation to the
9 Commission.

10 The first water body presented in here is for
11 Coon Creek. Coon Creek's -- yes, sir.

12 CHAIRMAN HERRMANN: Can I ask a question? How
13 were the newspapers chosen in which the notice was printed?

14 MR. SCHROEDER: We have public relations
15 staff who are familiar with the various newspapers that exist
16 throughout the state. We use that list to find newspapers
17 within the vicinity of these waters.

18 CHAIRMAN HERRMANN: Okay. Well, the -- the
19 notices that were included in the agenda booklet were
20 Jefferson County, Ste. Genevieve County, Cape County, Scott
21 County, New Madrid County, Mississippi County. There was
22 none in Randolph County. There was none in St. Louis County
23 or City of St. Louis.

24 MR. SCHROEDER: We used the Moberly Monitor
25 Index, I think it's called.

0066

1 CHAIRMAN HERRMANN: That was not included in
2 our agenda.

3 MR. SCHROEDER: It wasn't? I'm certain that
4 that advertisement made it into that paper.

5 COMMISSIONER PERRY: Here's an advertisement
6 here, but you can't see where it's from. That's Jefferson
7 County. The Coon Creek section says Jefferson County.

8 MR. SCHROEDER: Well, I don't see it.

9 CHAIRMAN HERRMANN: Well, that's --

10 MR. SCHROEDER: Somehow we missed...

11 CHAIRMAN HERRMANN: Yeah.

12 MR. SCHROEDER: Somehow we missed getting that
13 into this packet it appears, but I'm certain that it made it
14 into the Moberly Monitor Index. And maybe there's someone in
15 the audience maybe that could confirm that for us, but I
16 remember seeing it.

17

18 MR. SCHROEDER: Oh, okay.
19 MR. LAUX: Page 211.
20 MR. SCHROEDER: Page 211?
21 COMMISSIONER PERRY: It's Madison, Missouri.
22 MALE VOICE: That's a news article, that's not
23 the --
24 MR. SCHROEDER: Yeah, that's not the
25 department's ad --
0067
1 COMMISSIONER PERRY: That's not the
2 publication of the notice.
3 MR. GALBRAITH: We'll follow-up on that.
4 CHAIRMAN HERRMANN: Yeah.
5 .
6 MR. SCHROEDER: Any other questions?
7 CHAIRMAN HERRMANN: No.
8 MR. SCHROEDER: Okay. Coon Creek is the
9 classified segment that was subject to the use attainability
10 analysis is a nine-mile Class C segment in Monroe and
11 Randolph Counties. It receives discharges from the Moberly
12 wastewater treatment plant.
13 The initial review committee recommendation
14 presented to the Commission recommended that the use of whole
15 body contact recreational be -- recreational was inconclusive.
16 It was based on the UAA's finding that the depth met the
17 average depth criterion as spelled out by the Commission's
18 protocol. There was also one interview that was conducted
19 that the landowner, who was familiar with this creek,
20 indicated that he was aware of at least one pool that was
21 sufficient depth for swimming.
22 The Commission's action on September, 2005,
23 moved to remove the use, citing that it was overall absent
24 of sufficient depth, and stating that the stream was
25 inaccessible to the public.
0068
1 We had received several comments, as you'll
2 note in your packet, during our latest advertisement in a
3 newspaper stating that several landowners had previously swam
4 in the creek, and that several -- and some children visit
5 that segment of the creek. One particular landowner
6 indicated that he was aware of children in several deep holes
7 deep enough to swim in on her property, and then interviews
8 by several citizens indicate the stream has adequate depth
9 for whole body contact recreational use.
10 So what we have to consider at this point is
11 we have some actual depth measurements through the use
12 attainability analysis, and we have some confirmation from
13 some landowners that there is sufficient depth and some
14 swimming use is being put to that stream. So with that
15 information, the staff is coming to you today to, again,
16 recommend that we retain the whole body contact recreational
17 use on this particular segment, and would ask for a directive
18 by the Clean Water Commission on that issue.
19 Do you want me to go ahead and move through
20 the rest of these, or do you want to discuss these as we go?
21 CHAIRMAN HERRMANN: No, one at a time.
22 MR. SCHROEDER: Okay.

23 COMMISSIONER KELLY: And I move that the
24 Commission accept the report and restore the Coon Creek to
25 the whole body contact designation.

0069

1 CHAIRMAN HERRMANN: I have a difficulty with
2 that.
3 COMMISSIONER PERRY: Do we have more
4 discussion?
5 CHAIRMAN HERRMANN: Yes.
6 COMMISSIONER PERRY: More presentation before
7 we make the motion?
8 VICE-CHAIRMAN MINTON: I'll second it, so
9 continue on with the discussion.

10 CHAIRMAN HERRMANN: Okay. Do you want to add
11 something, Kristin?
12 COMMISSIONER PERRY: No, I'd like to hear what
13 the other people have to say.
14 CHAIRMAN HERRMANN: Okay.
15 MR. BRUNDAGE: Thank you, Mr. Chairman and
16 members of the Commission. I'm Robert Brundage. I'm legal
17 counsel for the city of Moberly and have participated in this
18 discussion concerning the UAA and the whole body contact as
19 we have proceeded through.
20 I want to introduce you two people here from
21 the city of Moberly. I think many of you know Mary West, the
22 Director of Public Utilities for the city. She's been
23 closely involved and follows these matters very closely, and
24 Geri Blakey, Water Quality Coordinator for the city of
25 Moberly, and they're here to help make sure that I provide

0070

1 accurate information to you. If I need any assistance, I can
2 turn to them. And if you have any questions of them, feel
3 free to call them up and ask them any questions, if I can't
4 answer them or if you'd like to hear from them.
5 I'd like to give you just a little bit of
6 background about the city of Moberly. It's a city of 13,741
7 people located in about the center of Randolph County on
8 Highway 63. Some of you -- the Commission members toured the
9 wastewater treatment plant at the --
10 (End of Tape One, Side Two.)
11 MR. BRUNDAGE: Coon Creek itself is a nine
12 mile stretch of classified stream. As Mr. Schroeder has
13 mentioned, it is a Class C stream, and you may probably know
14 that a Class C stream is defined as an intermittent stream, a
15 stream that during the summertime ceases flow but does
16 maintain pools that has aquatic life.
17 During this nine-mile stretch, the land use is
18 basically rural. There is cattle that have access to the
19 stream. On this unnamed tributary to Coon Creek where the
20 city has its wastewater treatment plant, that -- the initial
21 old wastewater treatment plant was constructed sometime in
22 the 60's, and it discharges into the unnamed tributary, and
23 it flows down the unnamed tributary approximately
24 three-tenths of a mile or so before it empties into Coon
25 Creek itself.

0071

1 Now, during this nine-mile stretch of Coon

2 Creek, it empties into Coon Creek, this unnamed tributary
3 roughly a 30 to 40 percent of the way down the stream of the
4 classified segment. Coon Creek itself, I believe, runs into
5 a fork of the Salt River over in Monroe county. Currently,
6 the city's wastewater treatment plant that was constructed in
7 1997, the one that several of you toured, does not have any
8 disinfection, and the plant was constructed in that manner
9 based upon the previous Commission rules where it was
10 presumed that there was no swimming in that creek.

11 If the city were to have to go ahead and
12 construct and add disinfection to its treatment plant, it
13 would cost upwards of a million dollars to add that to the
14 facility.

15 Just to make a comment about the process where
16 we are today, and about a rebuttable presumption to remove the
17 use from the stream, if you look back at what the Department
18 of Natural Resources staff did many years ago when they put
19 together the water quality standards, is that they used their
20 best professional judgment at that time to only put and
21 assign whole body contact to those streams that, using their
22 best professional judgment, had people swimming in it.

23 Now, best professional judgment is another way
24 of saying it's a process that we have formalized into what we
25 call a use attainability analysis. But unfortunately, back
0072

1 many years ago, that best professional judgment was not
2 reduced to writing, it was not put in the format of a UAA, so
3 here we are today having to go through this process to look
4 at numerous stream segments across the state.

5 And of course, the city had an interest in
6 looking at the stream to confirm that as the Department had
7 previous thought, there were not people, you know, swimming
8 in this stream, and they took the opportunity to do a UAA
9 this last year. Their first UAA was conducted in the month of
10 May, during a week which received a half an inch of rainfall,
11 which would be pretty favorable conditions to having water in
12 the stream.

13 These are the two UAA's that were prepared by
14 the city. The first one was submitted on July 8th, during
15 the public comment period on the rule. There was a
16 supplement submitted on August 15th. There was a lot of work
17 put into these documents. But let's look back at the
18 UAA guidance that precipitated documents like this. Like the
19 discussion we had earlier this morning about the listing
20 methodology, there was also another stakeholder group to come
21 up with the UAA guidance document, another long, painstaking
22 process to put that document together.

23 During that process, it was -- it's very
24 difficult to put numbers down on when somebody's actually
25 going to swim in a stream, and there was kind of two

0073
1 characteristics, I think Mr. Schroeder had mentioned, about
2 depth measurements. Does a pool have more than one meter
3 depth. If it did, maybe people have an opportunity to swim
4 in that pool as part of the guidance documents. Or if you
5 look at over the course of the stream where you stop and you
6 take measurements and you look at the average depth of the

7 water in that area, if it exceeds one point -- or excuse me, if
8 it exceeds a half a meter over half of the samples that you
9 collect, then that's another indication that maybe there is
10 some whole body contact recreation.

11 But look at the spirit of the UAA guidance
12 document that was prepared through the stakeholder process.
13 It was clearly understood that it was just that, a guidance
14 document. It was not something set in stone that if you just
15 tweak over here or tweak under, you're clear, or there's
16 whole body contact. There's other factors to look at. And
17 of course the guidance document recommended you can do
18 interviews, and take photographs, and that's what the city
19 did through their process.

20 There was discussion during the stakeholder
21 process about, you know, children playing in the stream. I
22 have two kids myself, and they'll play in about any puddle of
23 water you have around, whether it's in your street or whether
24 it's in the Current river where you can swim, or whether it's
25 in somewhere in between, kids are going to walk in water and

0074
1 play and splash in water. So does that equate to whole body
2 contact? I think the majority of people thought that no, we
3 need to look at depth, you know, can you swim in the water.
4 That's -- hence, the whole body contact recreation
5 designating use. That's the title of it.

6 We have swimming, we have to have people have
7 an opportunity to actually drink the water, so look at the
8 depth, can people submerge their body in it, and can they
9 swim. So there was a heavy dose of common sense to be used
10 in these guidance documents.

11 Now, when the -- the city prepared their
12 UAA's, they did a very thorough job. They took all their
13 measurements, they actually went out in the stream and
14 collected depth measurements with a ruler, they took all the
15 photographs like they were supposed to, they did nine
16 different interviews of people up and down Coon Creek. Those
17 nine people interviewed, not one said they swam or knew of
18 anybody else that swam in that creek.

19 So, back in September 7th, the Commission
20 agreed with the city's position that that -- the
21 UAA information that was collected did not rise to the level
22 that there was actually any whole body contact recreation
23 occurring on the stream, so the city respectfully disagrees
24 with the department's overly conservative application of
25 these general guidelines in this case. Because at the time,

0075
1 there was five different measurements on the stream. Only
2 one of those exceeded by a quarter of an inch the half a
3 meter average depth in the stream.

4 The guidelines talk about half their
5 measurements would exceed that one measurement exceeded by a
6 quarter of an inch. Somebody else said there was a pool
7 about a yard deep. Well, you know, we know a yard is less
8 than a meter, but that's, again, quibbling, but we had nine
9 different interviews at the time that people didn't swim in
10 the creek in these locations that Ms. Blakely had conducted
11 this thorough UAA. So I submit to you at the time the

12 Commission did the right thing and did not apply the whole
13 body contact use to that stream segment.

14 Through no fault of the Commission, here we
15 are today after another public comment period. When this
16 rule went through rulemaking, it was on public notice and
17 everybody in the state of Missouri had an opportunity to
18 comment on this stream. Albeit, they could have clearly read
19 this UAA document right here. This recommended, and we think
20 documented, there was no whole body contact recreation on
21 that stream. The public had an opportunity to look at this
22 document and comment on it.

23 They also saw the Department's basically one
24 line recommendation that they said there was, quote, evidence
25 of adequate depth to support assigning whole body contact.

0076

1 That's all the public had out there, and they did not submit
2 any comments at the time saying people swam in the stream.

3 So again, the Commission made the right
4 decision at that time. However, due to a technicality and
5 the EPA's insistence, the stream was put on public notice.
6 And let's look at that public notice, will you, and it was
7 pointed out, and this is not the public notice from the
8 Department of Natural Resources, but in your packet where
9 there was that, Mr. Hardecke is turning to it, and I'm not
10 sure what page number in your packet it is.

11

12 MR. BRUNDAGE: This is what gained front page
13 news in the city of Moberly. The Missouri Coalition for the
14 Environment, as they had done previously, had submitted a
15 press release to the city. And it appears that the city
16 published their press release verbatim on the front page of
17 the newspaper. When the Department of Natural Resources sent
18 their press release out, I believe it got in the newspaper,
19 we have no evidence of that here today; however, if it did,
20 it was probably in the legals in the back of the newspaper.

21 So what we have here is a -- is a news release
22 that I must give the Coalition of Environment some credit.
23 It was very craftily drafted.

24 CHAIRMAN HERRMANN: Can you spell that?

25

0077

1 MR. BRUNDAGE: It was very craftily drafted. It
2 was disguised as a press release from a -- from authoritative governmental
3 agency. Instead of a press release from the Missouri
4 Coalition for the Environment, but be that as it may, the
5 city -- the Moberly Monitor Index took it hook, line, and
6 sinker and put it on the front page. We talk about how the
7 city will be exempted from statewide antipollution rules.

8 Again, these rules never applied to the city
9 in the first place, so I would dispute that statement. And
10 it also talks at the end of the second paragraph if Coon
11 Creek is exempted, sewer agencies and other facilities will
12 be allowed to continue to release bacteria laden water, and
13 it goes on to talk about how this water may contain viruses,
14 parasites, and other pathogens that can make people sick with
15 ear infections, typhoid fever, hepatitis, gastroenteritis,
16 dysentery and other illnesses.

17 It talks about how the Commission, at the last
18 minute and against the recommendation of the Department,
19 listed Coon -- or put Coon Creek on the exempt list, if you
20 will. So this is what the public in Randolph County had to
21 look at as what could have been basically perceived in our
22 mind a press release that is somewhat misleading about what
23 the true nature of what we're trying to accomplish and the
24 true nature of the risk.

25 To the city's knowledge, they have no

0078

1 knowledge of anybody that has gotten sick in Coon Creek.
2 Probably because nobody swims in Coon Creek, but there's no
3 knowledge of that. So we have this press release out there,
4 and what did it precipitate? And one of the things it
5 precipitated was what was way back during the stakeholder
6 meetings was worried about is that what happens if somebody
7 just submits one letter and says we swam in that creek.
8 Period. And that's all you have on the record.

9 That is just about all we have on the record
10 right now. Will a letter like that be enough to counteract a
11 thorough use attainability analysis on the stream. Well,
12 let's look at some of the public comments that came in.
13 There was -- of all the comments letters, there was about
14 three that talked about some kind of use that had to do with
15 the water.

16 There was a man named Dean Holman ,
17 who submitted an e-mail that talked about he hunt and fished
18 and people would ask permission to trap on the river. Well,
19 that doesn't entail whole body contact recreation. The
20 Missouri Department of Natural Resources -- or I'm sorry,
21 excuse me, the Missouri Department of Conservation took it
22 upon themselves to go out and try to start interviewing
23 people to submit a comment letter. And that's what they did.
24 They found a lady named Mona Afrassiab .

25 FEMALE VOICE: Afrassiab.

0079

1 MR. BRUNDAGE: Thank you. It's in the record
2 here.

3 COMMISSIONER PERRY: It's here A-F-R-A-S
4 S-I-A-B.

5 MR. BRUNDAGE: I'm going to refer to her as
6 Mona. She says she has several children that have gone out
7 and splashed and played and have waded looking for crayfish
8 in the river -- or excuse, Coon Creek. The conservation
9 department's letter also refers to a Mr. Todd who says he
10 takes his grandchildren who turn out to be 1 and 3 years old
11 down to the river to play and splash in the water along a
12 sand bar. So that's some other evidence that people
13 actually --

14 COMMISSIONER PERRY: And that part I don't
15 understand. It also says the children were too young to
16 swim -- oh, so they splashed, but they don't swim?

17 MR. BRUNDAGE: That's my understanding. And
18 then what blows my mind, I wish I could find a letter quickly
19 here. The last paragraph on the first page, several
20 landowners stated that they previously swam and fish in the
21 creek, but no longer participate due -- participate in those

22 activities in Coon Creek due to pollution from the prison
23 facility. Again, these landowners are totally unnamed,
24 there's no names, there's no locations.

25 This letter was submitted without any

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1 photographs, without any locations of where these people had
2 this information -- or where apparently have these activities
3 going on. There was no depth measurements, so we don't know
4 what they were actually wading or splashing in. There was
5 one other letter, other than Missouri Department of
6 Conservation's letter.

7 There was a letter from a Larry Johnston,
8 Madison, Missouri. Madison, Missouri is in Monroe County.
9 That is downstream. He talks that he believes that Coon
10 Creek is deep enough to paddle around in for a beginning
11 swimmer. Again, he doesn't mention that, you know, where in
12 Coon Creek. We know he lives down below Coon Creek where --
13 I think he lives below Coon Creek where -- in Monroe county,
14 it flows into the Salt River, or the Elk Fork of the Salt
15 River. So maybe this person has knowledge of it, maybe he
16 doesn't, but he claims to say that it is deep enough to
17 paddle around in for a beginning swimmer. Again, there's no
18 location, there's no depth measurement. There's no names of
19 anybody who have actually swam in the river.

20 So that is what the Department of Natural
21 Resources is -- is basing their recommendation on. If we
22 look back to their original recommendation, it was based upon
23 one out of five samples that exceeded the average depth by a
24 quarter of an inch when their own guidance say that three,
25 more than 50 percent would have to exceed it. So DNR didn't

0081

1 follow their own guidelines right there. The other one was
2 it had to be a meter depth. Somebody thought there was a
3 pool a yard deep somewhere, but it was never -- I guess
4 documented, but somebody said that. And maybe there was, but
5 that was just one.

6 We have nine interviews from Ms. Blakely
7 conducted that there's no whole body contact. Other than
8 that, we have several children that have splashed and played
9 in the stream. Now, we were curious to know what these
10 locations looked like after the city thought it did a very
11 thorough UAA. So they had went and took photographs of these
12 areas.

13 And the stream, by -- and Mona forgive me, but
14 Mona's property, her property is located 400 -- approximately
15 440 yards from the very upper section where this intermittent
16 street becomes nonclassified, so it's the very far upper end.
17 And that creek at that location is a creek that you can
18 basically jump across. I can hand this photograph to you
19 here to look at. So we need to put this in perspective about
20 allegations about people swimming in the stream. The
21 photograph that I just handed Commissioner Kelly is a view
22 upstream and to the unclassified portion.

23 This photograph here, the second one coming
24 down here, is a photograph downstream in the classified
25 intermittent portion of Coon Creek, approximately 440 yards

0082

1 from Mona's property. It's extremely small. It's
2 approximately six inches deep, maybe, and you could just hop
3 across it.

4 There was one other comment about a Mr. Todd,
5 who took his, -- Commissioner Perry, took his children down to
6 the creek to -- to wade in off a small sand bar. That was
7 approximately halfway down Coon Creek. This photograph here
8 is our best guess at that location. Mr. Todd's property, and
9 we're familiar with it because Ms. Blakely interviewed
10 Mr. Todd this summer. And at the time he didn't mention
11 anybody swimming in the creek. But subsequently, he says
12 that his grandchildren had gone down to splash in the creek.
13 But again, at that's not the same thing as swimming, but --
14 and I'm not faulting Mr. Todd, but here's a photograph, we
15 believe, of that location. Again, if you look at the
16 photograph, you can basically tell the water's clearly less
17 than a foot deep, you know, maybe six or eight inches deep or
18 something like that.

19 So in closing, members of the Commission, I
20 would like you, at this point in time, with all due respect
21 to Commissioner Kelly, to defeat Commissioner Kelly's motion.
22 And then make a motion to reaffirm what you did back in
23 September to not assign the whole body contact recreation
24 based on the good work that the city of Moberly has done, and
25 based upon, if you look at the weight of the evidence of this

0083

1 work that is done compared to uncorroborated letters
2 submitted with no follow-up by the Department of Natural
3 Resources to actually try to confirm any of this information,
4 with either photographs, depth measurements, any kind of --
5 any kind of information of that nature, I would submit to you
6 that we have met the burden of proof, and that you should
7 affirm what you have done previously. Thank you very much.

8 CHAIRMAN HERRMANN: Thank you, Robert.

9 COMMISSIONER PERRY: Robert, one question. Do
10 you have any reply? There is the one comment made here about
11 pollution from the prison facility.

12 MR. BRUNDAGE: The prison is located and
13 discharges from lagoons -- an aerated lagoon upstream of the
14 classified section of Coon Creek, so it is in the
15 unclassified section of Coon Creek. And I'm glad you brought
16 that up because there's a possibility that at some point in
17 the future that the prison may connect to the city of
18 Moberly's wastewater treatment plant. And if they do so,
19 there's going to be 200 to 300,000 gallons less water per day
20 coming down Coon Creek. And I don't know how far the prison
21 is from Mona's property, a mile -- couple miles.

22 COMMISSIONER PERRY: Approximately.

23 MR. BRUNDAGE: Approximately a couple miles,
24 but the first photographs I provided to you, there's going to
25 be a lot less water in that ditch at that point and time if they do
0084

1 connect than there is now.

2 COMMISSIONER PERRY: When we did the working
3 group, you -- this is the problem that you were concerned
4 about, where you have one or two. Did the group have any
5 suggestion on how that sort of situation should be handled?

6 MR. BRUNDAGE: If they did, I can't recall it,
7 but I just remember the spirit of this whole document was
8 that it was a guidance document. And since it is a guidance
9 document, it gives the Commission leeway to use their
10 professional judgment, to use their common sense on whether
11 or not this stream segment sustains whole body contact
12 recreation. So I don't think there was definitive guidance
13 on how to handle that. Any other questions?

14 COMMISSIONER HARDECKE: From what I see in here, you
15 know, your three feet is not a meter, to be technical about
16 it. And the one location, about half a meter is only one,
17 not half the locations, so it looks like we haven't been --
18 even with the news article, we didn't generate any more new
19 comments that would indicate that.

20 COMMISSIONER PERRY: That's the Department of
21 Conservation letter.

22 CHAIRMAN HERRMANN: Do you want to add
23 anything, Mary?

24 MS. WEST: We would just like the
25 Commission to vote on the side of sound science and not

0085

1 emotion generated by an article that was in the newspaper
2 based on other than a Department of Natural Resources press
3 release. I think that some of the property owners were
4 overly concerned that limits would be relaxed at the
5 wastewater plant or something like that. And in fact, that,
6 we all know, is not the truth. So we actually improve the
7 water quality in the stream.

8 COMMISSIONER PERRY: Closed Session.

9 VICE CHAIRMAN MINTON: Second it.

10 CHAIRMAN HERRMANN: Moved and seconded. Any
11 discussion?

12 MS. WEST: and we would also
13 let you know that, as I've said here previously, we done
14 several rate increases now. In 1980 -- or in 2002, the rates
15 went from \$1.00 to \$4.12. In June of this year, they went up
16 another \$.15 to \$4.27, and we're actually anticipating
17 another \$.15 increase in June of '06, so an average sewer
18 bill is going to be about \$35 a month in the city of Moberly
19 for a family of four.

20 We are doing a number of projects in town to
21 do combined sewer separation and other sewer improvement
22 projects. If we have to do this, and put disinfection in at
23 the wastewater plant, then some of those projects will have
24 to be postponed because there is very limited amount of money
25 available even with our high rates. So we would ask that we

0086

1 look at the overall improvement of the water quality in the
2 area and let us continue with the work that we're doing and
3 not do something that -- that basically would serve no -- no
4 good -- good use. And I'd be happy to answer any questions.

5 CHAIRMAN HERRMANN: Thank you. Geri, did you
6 want to add anything?

7 MS. BLAKELY: I don't have anything else.

8 CHAIRMAN HERRMANN: Okay.

9 MS. BLAKELY: Unless you have a question
10 concerning -- oh, I did, on the land owner that said he

11 thought he had three feet. I took my chest waders and headed
12 down the creek with my nephew and my measuring pole. We
13 couldn't access it. From the creek bank where it was, you
14 had an eight or ten foot drop almost straight down. I was
15 raised on a riverbank, so I -- I'm familiar with creeks, and
16 we tried going up the creek to access that point at a low
17 spot, and we couldn't because of beaver dams, fallen trees,
18 and things of that nature. So there was no way to access the
19 deeper water to measure if it was three feet under, over, or
20 thereabouts. So that was my only ...

21 CHAIRMAN HERRMANN: Thank you.

22 MR. SCHROEDER: If you'll let me, I just want to
23 clarify the depth measurements that were considered by staff
24 on this. We -- I went back and actually looked at the UAA,
25 and what it presented in terms of depth measurements, and

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1 there's three sites that were observed in the UAA. And the
2 second site or the middle site of the length that they
3 evaluated, it reported 20 inches as the average depth at that
4 point. And 20 inches is just a hair over the Commission's
5 protocol of a half meter depth, so that's -- that's the depth
6 measurement that we had used.

7 CHAIRMAN HERRMANN: One of the letters
8 suggested that all of these mentioned streams should be
9 protected because they're all near major metropolitan areas
10 for recreation, so you'll be glad to know, Mary, that Moberly
11 is now a major metropolitan area.

12 MS. WEST: (Inaudible).

13 CHAIRMAN HERRMANN: Yes.

14 COMMISSIONER PERRY: I have a legal question.

15 CHAIRMAN HERRMANN: Yes.

16 COMMISSIONER PERRY: Is this November 28th
17 letter within the notice period, or the public comment
18 period?

19 CHAIRMAN HERRMANN: November 28th?

20 COMMISSIONER PERRY: Uh-huh, 2005. The
21 Department of Conservation letter.

22 MR. BRYAN: I'm sorry, what was your question?

23 COMMISSIONER PERRY: Well, I think because of
24 advice, we put this back open for public comment at that last
25 meeting. And how long was that comment period?

0088

1 MR. BRYAN: 30 days.

2 COMMISSIONER PERRY: And did that include
3 November 28th?

4 MR. BRYAN: I note it's the same day as
5 Mr. Brundage's letter.

6 COMMISSIONER PERRY: Okay. Will you be
7 telling us about that?

8 MS. DISTEFANO: I'm Cindy DiStefano
9 with Missouri Department of Conservation, and I did send it
10 on the last day, and that's because I had to get approvals up
11 the chain to make the comment. And I also wanted to say that
12 MDNR staff did follow-up on my letter, making sure that who I
13 talked to, and they called the agent, and so they did make
14 several contacts to make sure that the information I had was
15 correct.

16 COMMISSIONER PERRY: Did you go down and look
17 at the water where these people were talking about?
18 MS. DISTEFANO: No, I didn't, I just took our
19 conservation agent's word for it. What did she do was look at a
20 plat map, and she saw that her physician actually had
21 property on the -- on the stream bank, and so that she went
22 ahead and she talked to her to see what -- what -- how her
23 family uses it, and that's Dr. Affrassiab.
24 COMMISSIONER PERRY: But no one went down from
25 your department?
0089
1 MS. DISTEFANO: She was there, the conservation
2 agent was there.
3 COMMISSIONER PERRY: Did the conservation
4 agent -- you said she looked at a plat map, did she actually
5 get down to the creek?
6 MS. DISTEFANO: I didn't ask her, I just took
7 her word that she went and talked to several landowners on
8 the creek bank. I did not ask her if she actually went down
9 and looked at the creek bank.
10 CHAIRMAN HERRMANN: According to your letter
11 on her property, the people didn't swim. The kids waded and
12 looked for crawfish.
13 MS. DISTEFANO: They waded waist deep and
14 played with crayfish. And Mr. Todd said that his 1- and
15 3-year-old grandchildren did not know how to swim yet.
16 COMMISSIONER PERRY: This is a million dollar
17 decision, and I'd feel a little bit more confident if
18 somebody from staff had actually gone down and looked at it.
19 MS. DISTEFANO: I can call the agent and talk
20 to her, try to get a hold of her. I don't know. Would you
21 like for me to do that?
22 CHAIRMAN HERRMANN: Well, subsequent to the
23 newspaper article, there were eight comment letters
24 submitted. Yours was the only one that said anybody swam in
25 the creek. The others are all talking about hunting,
0090
1 trapping, and --
2 MS. DISTEFANO: She did hear from several
3 people that had swam earlier before the prison was put in,
4 and they were -- and they were very concerned about --
5 CHAIRMAN HERRMANN: But none of the other
6 seven letters mentioned anything about any kind of recreation
7 or wading or anything else. Fishing, yes. And fishing from
8 the bridge.
9 MS. DISTEFANO: I can only say that that's the
10 information that she gave me.
11 MALE VOICE: Who were those seven landowners,
12 do you have names?
13 MS. DISTEFANO: The Dr. Mona Affrassiab and Mr. Todd
14 were the only names she gave me. She didn't --
15 COMMISSIONER PERRY: You didn't talk to any of
16 these people?
17 MS. DISTEFANO: I did not talk, our agent did.
18 COMMISSIONER PERRY: How come she didn't write
19 the letter?
20 MS. DISTEFANO: Because that's my job, because

21 I'm the one that's supposed to write the letters.
22 CHAIRMAN HERRMANN: How come the doctor didn't
23 write the letter?
24 MS. DISTEFANO: I don't know.
25 CHAIRMAN HERRMANN: I think that's your
0091
1 question.
2 COMMISSIONER PERRY: Well, that's the lawyer
3 thing about hearsay.
4 MS. DISTEFANO: That's the way we work. It's
5 my job to work with DNR and to get the information that you
6 request, and so I send the information to the agents -- which
7 we've done this for years -- and then they respond back to
8 me. I write the letter, I pass it up through the chain, get
9 it approved, and then send it to you guys.
10 COMMISSIONER PERRY: We have someone here who
11 went out and walked the creeks, who said, no, this isn't
12 accurate.
13 MS. DISTEFANO: I can call the agent and ask if
14 she actually walked the creek, if you would like.
15 COMMISSIONER PERRY: Obviously we're in kind
16 of a tough situation here.
17 MR. BRUNDAGE: My office called the agent. From
18 what I recall, she did not walk the creek.
19 COMMISSIONER PERRY: Thank you.
20 MS. DISTEFANO: Any more questions?
21 COMMISSIONER PERRY: (Inaudible).
22 CHAIRMAN HERRMANN: Yes.
23 MS. BLAKELY: I tried to call (inaudible)
24 because in her -- because in her letter, she stated she
25 couldn't remember the people's name without the plat map. So
0092
1 I called, left my name and number, the reason I was calling,
2 and she never returned my call. So I had no way to directly
3 talk to these unnamed people because she never returned my
4 call.
5 MS. DISTEFANO: I apologize for that. It was
6 deer season and she works odd hours, and so I'm sure that she
7 did the best she could.
8 CHAIRMAN HERRMANN: We have a motion on the
9 floor, I think. Would you restate the motion for us -- oh,
10 you don't have a -- it's on tape. Would you restate your
11 motion, please?
12 COMMISSIONER KELLY: Yes. The motion is to
13 restore Coon Creek to its whole body contact designation
14 following the report to us by the -- by the Department.
15 CHAIRMAN HERRMANN: Okay. You seconded for
16 purposes of discussion?
17 VICE-CHAIRMAN MINTON: Yes.
18 CHAIRMAN HERRMANN: Do you stick with your
19 second?
20 VICE-CHAIRMAN MINTON: Yes.
21 CHAIRMAN HERRMANN: Okay. Then call for the
22 vote, please, Marlene.
23 MS. KIRCHNER: Commissioner Kelly.
24 COMMISSIONER KELLY: Yes.
25 MS. KIRCHNER: Commissioner Minton.

0093

1 VICE-CHAIRMAN MINTON: No.
2 MS. KIRCHNER: Commissioner Perry.
3 COMMISSIONER PERRY: No.
4 MS. KIRCHNER: Commissioner Hardecke.
5 COMMISSIONER HARDECKE: No.
6 MS. KIRCHNER: Chairman Herrmann.
7 CHAIRMAN HERRMANN: No. Would there be a
8 substitute motion on this matter?
9 MR. GALBRAITH: Does there need to be? I don't
10 think there needs to be. It stands as -- it stands as not
11 whole body contact as we did before.
12 CHAIRMAN HERRMANN: As we did before. Okay.
13 COMMISSIONER KELLY: As much as we have -- the
14 main stumbling block seems to be that we're not quite sure
15 who -- who are the people or what they have done, or the
16 exact -- we still have testimony out there, it just seems
17 maybe a little vague. Can we not go back and -- and just
18 asking people to go back again, but can we not go back again
19 and get the names of the seven people who used to swim in it
20 before the prison and the various other things that were a
21 little vague?
22 CHAIRMAN HERRMANN: That's what we did after
23 the last meeting.
24 COMMISSIONER KELLY: Well, we didn't get it.
25 CHAIRMAN HERRMANN: We had people go back to

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1 verify, or not verify.
2 COMMISSIONER KELLY: But we didn't get it.
3 CHAIRMAN HERRMANN: We got eight comment
4 letters, only one of which said maybe somebody swam in it.
5 The other seven didn't.
6 COMMISSIONER KELLY: Well, this goes back,
7 again, and I don't know what we can do about this, but in --
8 in insisting that people have actually swum in it since --
9 what is the date that we said?
10 CHAIRMAN HERRMANN: '75.
11 COMMISSIONER KELLY: Okay. That we don't
12 provide for the fact that much of the reason people are not
13 swimming is because we are polluting, and people would
14 swim -- and that's, I realize, something that's hard to -- to
15 get proof for, but I think that they're probably are people
16 out there. Again, these people who -- who whether rightfully
17 or wrongly think that there's pollution coming downstream
18 from the prison. But as population goes up and people move
19 into the country, I think we're going to be sorry that we
20 don't -- we haven't designated more streams whole body
21 contact.
22 MR. SCHROEDER: Well, I'm glad we took care of
23 the easy one first. If the Commission might entertain, I --
24 I could sort of talk about the River Des Peres and Maline
25 Creek together, because the evidence and the situation is

0095

1 very similar.
2 River Des Peres is -- is in actually two
3 segments. There's a half -- one and a half mile segment
4 that's classified as Class P, runs up from the confluence

5 with the Mississippi River. Above that is another mile
6 segment that's classified as Class C. So we're talking about
7 a two and a half mile segment of stream here.

8 Staff's original recommendation was that we
9 render our conclusion as inconclusive with respect to River
10 Des Peres. Our -- our feeling that it's inconclusive is
11 based on the fact that it did meet the depth requirement, but
12 there wasn't any known swimming use, and there was
13 presentation by those who presented the UAA that other
14 criterion might apply here, such as criterion six for the
15 widespread substantial economic -- socioeconomic impact from
16 having to provide treatment to meet water quality standards.

17 And also, for the potential affect that
18 hydrologic modification might have on the recreational uses
19 in these waters. That seems like a pretty compelling reason
20 to look further into those two criterion. Those criterion,
21 though they've been mentioned in the UAA, really haven't been
22 fully explored. And the staff feel as though they should be.
23 Because of the -- the -- just like Coon Creek, this one sits
24 right on the line, or just inside the criterion for being
25 considered as deep enough for swimming, but there's no

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1 existing uses, there's no occurring uses, keeping it open for
2 other criterion to apply as a reason for removing the use.
3 And because those other two potentials have been presented to
4 us, we feel like it really -- they ought to be explored. So
5 our --

6 CHAIRMAN HERRMANN: Phil, are you talking
7 about the P section or the C section?

8 MR. SCHROEDER: Actually, I'm talking about
9 both.

10 CHAIRMAN HERRMANN: Both of them don't meet
11 the depth criterion. The P may, but the C certainly does
12 not.

13 MR. SCHROEDER: Well, we have in our record
14 that both segments meet the average depth requirements. That
15 would be the half meter depth average. I don't have the
16 actual UAA in front of me to be able to --

17 CHAIRMAN HERRMANN: I do.

18 MR. SCHROEDER: -- from the actual depth
19 measurements, but that's what our conclusions found. Albeit,
20 like Coon Creek, it doesn't meet it up and down all of the
21 segments either. I mean, it's -- it's occasional. The
22 Commission, of course, in their decision in the rule decided
23 to remove the use.

24 Our review of the additional information that
25 we had received, again, points to the fact that there's an

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1 average depth requirement that's been met, however there's no
2 occurring uses that's been established. And we would like to
3 see further work on the other criterion in the protocol be
4 explored before any kind of affirmative decision is made to
5 either retain or remove the use. And that would apply to
6 both segments of the River Des Peres.

7 And as I was mentioning earlier, I think the
8 same situation applies to Maline Creek. They're both subject
9 to hydrologic modifications, substantial hydrologic

10 modifications which may affect the recreational uses. Both
11 of them are very marginal with respect to meeting the depth
12 criterion, and neither stream has any recorded or observed
13 swimming uses in those segments.

14 So again, a recommendation of inconclusive and
15 recommendation to further look into this matter with the
16 assistance of the Metropolitan Sewer District is what we're
17 really recommending. We'd like to work with them on looking
18 at the other criterion.

19 MR. GALBRAITH: So the Commission could not --
20 they could vote to leave their designation the same, but
21 request that these other criterion be looked at without
22 changing the designation from not whole body contact. So
23 that's a variation on what we've put in here as a
24 recommendation.

25 MR. SCHROEDER: It wouldn't be going to repeat
0098

1 any work that we have he already done. We've looked at the
2 depth, we've talked to people, and done our interviews, done
3 our advertisement. What we're asking to do now is look at
4 the potential for criterion six, which measures the
5 substantial and widespread socioeconomic impacts from having
6 to provide treatment to meet the water quality standards in
7 these streams.

8 I think we can work with MSD in coming to some
9 conclusion on that. We can also look a little further into
10 the hydrologic modifications in how they affect recreational
11 uses in that stream, and perhaps come to a conclusion with
12 the Commission on the real affect of that. So -- and like I
13 said, I don't think we've really explored or MSD has really
14 explored that to great enough depths, not to use a pun.

15 COMMISSIONER PERRY: The cranks are a little
16 bit slow. Your recommendation is that it have further
17 exploration. What I can't quite understand, are you saying
18 that we should remove the use, leave it removed and have
19 further exploration, or --

20 MR. SCHROEDER: Yeah, I'm saying as I said
21 earlier, one of the things we have to do in our work with use
22 attainability analysis is rebut the presumption.

23 COMMISSIONER PERRY: I understand that.

24 MR. SCHROEDER: The staff's conclusion is
25 basically that we have not received enough information to be
0099

1 able to satisfy the rebuttal, to do the rebuttal, okay.

2 COMMISSIONER PERRY: As what we voted had
3 happened.

4 MR. SCHROEDER: Right. You voted that there
5 was a sufficient information to rebut the presumption. Staff
6 is suggesting that there's not sufficient information to
7 rebut the presumption, but there may be under the two other
8 criterion, sufficient information that could be presented in
9 those two other criterion -- criteria to rebut the
10 presumption. We'd like to explore that.

11 And so we're asking for the Commission's
12 indulgence to allow that to happen, if MSD is wanting to work
13 with us on it. I mean, if not, then perhaps it may not make
14 any sense to moving in that direction, but we're certainly

15 supporting that -- that -- that path.

16 CHAIRMAN HERRMANN: Okay. (Inaudible).

17 MR. THEERMAN: Mr. Chair, Commission, my name's
18 Jeff Theerman. I'm the Executive Director of the
19 Metropolitan St. Louis Sewer District. We appreciate you
20 coming on our tour yesterday. Commissioner Perry and Minton,
21 if you'd ever like to spend an afternoon in a sewage
22 treatment plant, the invitation's there for you as well.

23 CHAIRMAN HERRMANN: But they don't have a
24 coffee pot.

25 MR. THEERMAN: The issue of whole body contact
0100

1 in St. Louis is of great importance to our ratepayers. MSD
2 has spent over a billion dollars improving its collection
3 system and treatment facilities over the last 10 to 15 years.
4 We intend to spend \$3.7 billion over the next several decades
5 addressing water quality concerns with our existing
6 infrastructure.

7 Having said that, I can -- I can really
8 appreciate Mr. Brundage comments about common sense, and
9 about doing what makes sense with sound science. Because of
10 what we see coming and the investment we're going to make in
11 our infrastructure, it is essential that we always are
12 looking at value for our ratepayers, that indeed the monies
13 we spend are spent prudently, and that they yield results
14 environmentally.

15 MSD conducted a number of UAA studies on the
16 Mississippi, Maline Creek and the River Des Peres. We also,
17 based upon our knowledge of the Missouri River elected not to
18 submit a UAA, because we're of the belief that there's
19 sufficient recreational use in that water that the standards
20 may need to be changed, and we're prepared to meet those
21 standards at our Cold Water and Missouri River treatment
22 plants, if indeed that becomes necessary.

23 We found no whole body contact recreation in
24 the three rivers I mentioned, Maline Creek, the River Des
25 Peres, and the Mississippi River. We believe it doesn't make
0101

1 sense to provide disinfection at our facilities where there
2 is no whole body contact recreational use. I appreciate the
3 Department's comments, I'm not sure I completely understand
4 what Phil was getting at.

5 We are -- we have been and we will continue to
6 be very willing to work with the Department on issues of
7 water quality, including Maline Creek and the River Des
8 Peres. We have a long-term control plan to develop for our
9 combined sewer system that will involve those two water
10 bodies. But we -- we urge the Commission not to change the
11 designation they've made on these water bodies, and I guess
12 I'd like to ask John Lodderhose to come forward
13 and make some comments specifically about those two regions.
14 John.

15 MR. LODDERHOSE: Commission, good morning,
16 John Lodderhose with MSD. Yeah, I appreciate Phil's
17 acknowledgment that on River Des Peres and Maline Creek,
18 there's no existing use. We concur with that. Our studies
19 show that and seems like his staff has also recommended that.

20 The main question here is that does it meet the depth
21 criterion, and can it be removed. And we did hire Midwest
22 Environmental Consultants to do a UAA study on these creeks.

23 And on the River Des Peres, they did an
24 extremely thorough analysis. They actually did 20-something
25 transects, every thousand foot increments where they measured

0102

1 from one bank to another to determine the average depth. In
2 every case, it was less than the average depth to meet the
3 criteria that you could not swim in it. Now, subsequent to
4 that, I guess the Missouri Coalition Environment went out
5 about a year later and did some depth measurements, and
6 their findings suggest that it's just over the average depth
7 criteria. But if you look at their comment letter, I think
8 they did kind of a modified procedure.

9 They didn't do a transect. What they did is,
10 from what I understand, they went to the deepest part of the
11 pool, they took those measurements, so it's more of an
12 average maximum depth than an average depth, so I think
13 certainly on River Des Peres, it was very clear that from our
14 studies with the very valid transects that we did every
15 thousand foot that there's -- it's incapable to support
16 swimming.

17 On Maline Creek, our studies did show that we
18 had six transects there, that one of the six exceeded the
19 average depth. But consistent with other UAA's approved by
20 MDNR staff where they found that one out of six is not
21 representative of the reach, and a reference specifically,
22 Horseshoe Creek in Jackson County, they actually recommended
23 to remove the use on that stream. So I think to be
24 consistent, they should also remove the use on Maline Creek.
25 I think that would be my main comments.

0103

1 Trent, do you want to add something to that?

2 MR. STOBBER: Again, my name is Trent Stober
3 with MEC Water Resources. We conducted the use attainability
4 analysis.

5 (End of tape two, side one.)

6 MR. STOBBER: The sites that we evaluated, the
7 transects that -- that -- that we randomly selected, again,
8 based on -- on John's definition approximately a thousand
9 foot intervals met the average depth. In fact, the maximum
10 mean depth of our transects that we recorded was 1.37 feet,
11 which is below half a meter. Additionally, the -- the
12 average of all the 21 or 22 segment -- or transects was
13 approximately point six (.6) feet.

14 So I believe some of the Commissioners had the
15 opportunity to see River Des Peres yesterday. I think you
16 saw some representative segments of that, and again, on your
17 visual observations, it's quite apparent to me that that's
18 not a -- a water body that's attainable for recreational
19 uses.

20 With respect to the hydrologic modifications,
21 we did do some technical evaluations of that, and at least at
22 the Morgan Ford staging station that the USGS maintains,
23 essentially when the water's deep enough to meet the DNR
24 criteria -- or your criterion for swimming, the maximum depth

25 criterion, then the velocities get to a point to where it's
0104

1 either unsafe or marginal swimming conditions, essentially
2 two feet per second.

3 So our feeling is that when the river does get
4 to a point where it meets that use, that the hydrologic
5 modifications that have been made create velocities
6 sufficient enough to warrant unsafe swimming conditions. So
7 with that, I'll open for any questions.

8 I would be remiss -- we -- we did find one
9 isolated pool, as well as the Coalition did as well, that
10 exceeded the maximum depth criterion. However, we feel that
11 these are not representative, and I suspect that with the
12 amount of scrutiny that this stream has been under, that
13 those are probably the only two pools within that segment
14 that -- that don't meet that, and those are primarily due to
15 scouring from other storm water inflows and so forth. And
16 with the modified structure, those -- those pools should
17 probably be stabilized with MSD, and probably prevent those
18 in the future. Thank you for your time.

19 CHAIRMAN HERRMANN: Thank you, Trent. Anyone
20 else wish to make a comment? Yes, sir.

21 MR. SHERBURNE: I'm Dan Sherburne, and
22 I'm with Missouri Coalition for the Environment. With
23 respect to the measurements taken by MSD (inaudible) they
24 took theirs in October of 2004, October. We took ours in
25 late October of 2005. Virtually a year apart.

0105
1 As you can see from the photographs that we
2 submitted and the ones I submitted in our UAA, there is
3 considerably more water throughout the reach of the River Des
4 Peres in 2005 than 2004. That's despite the fact that both
5 are drought years. Years in which the base flow would be --
6 or the flow we would see there would be lower than what might
7 be considered a base flow. I -- given that there was very
8 little rainfall in October, the entire month before we took
9 our measurements, I would probably submit that ours are
10 closer to what an actual base flow would be in a normal year,
11 rather than what MSD was finding in their year.

12 With regard to the methodology, one thing I
13 think should be pointed out with respect to the UAA protocol
14 as a whole in how the UAA's were done, there is no protocol
15 for how depth measurements were to be taken. We contacted
16 DNR about that, talked to them about it. They acknowledged
17 there was no such protocol. There was no such training given
18 in how -- how depth measurements should be taken. And in
19 point of fact, they were taken in various ways.

20 The method used by MSD's consultants of
21 transects every 1,000 meters disregards what's on the form
22 which asks for run below and above a particular locality. It
23 doesn't ask for the entire depth of the entire river. It
24 asks for the depths of particular runs, areas between riffles
25 along a line of stretch. With the idea being along with

0106
1 maximum depth in holes, swimming holes, is there average
2 depth along significant stretches where people could swim,
3 kids could play, whatever. So doing a simply 1,000 meter

4 increments can easily miss deeper stretches of -- of the runs
5 themselves.

6 Now, some places, some UAAs, they did
7 measurements taking just specific runs above and below,
8 portions of runs above and below, different levels of
9 transects going across, different numbers of measurements.
10 Some did not use transects at all, but did something more
11 akin to what we did, which was simply to find those areas
12 that were above one-half meter in depth, and to extend and
13 see how far they went.

14 Did they meet the really the intent of the
15 UAA protocol, which is to show that these are areas that
16 people can swim in, people can play in, kids can play in, and
17 get pretty darn wet? You can -- you can appropriate bacteria
18 from discharges in a variety of ways, through cuts in your
19 feet, walking barefoot, can easily simply lead to infections
20 as well as anything else, as well as actually inviting water.
21 Kids can splash, play in the water, get themselves very wet,
22 and take in a lot of water through various means, through the
23 ears, eyes, nose, mouth, and other sores, cuts and sores. So
24 to simply go by swimming and adult swimming, I think misses
25 the point, misses the intent of whole body contact

0107

1 recreation. It's to protect people.

2 COMMISSIONER PERRY: I just didn't understand
3 what you meant by "adult swimming". Do you have any evidence
4 of anyone swimming in this?

5 MR. SHERBURNE: There were -- I believe in the
6 comments, there were people who talked about having seen or
7 having swam in the River Des Peres at some point in the past.

8 CHAIRMAN HERRMANN: There were several people
9 who said they swam in the branch in Heman Park,
10 and since I was born and raised in that area and my mother
11 lived there until she got to be 92 years old, and as juvenile
12 delinquents, we used to jump the creek to go in and pull the
13 trolleys on the streetcar line that ran past Heman Park.

14 I played on the baseball fields in Heman
15 Park. I played tennis on the tennis courts in Heman Park.
16 I swam in the swimming pool at Heman Park. I can tell you
17 that anybody that said they swam in that branch of River Des
18 Peres is either exaggerating or hallucinating. It's not a
19 possibility. Never has been in my 77 years on this earth.

20 MR. SHERBURNE: Well, I've been in that stretch
21 of River Des Peres as well. I do stream team surveys there.
22 I've done an actual mapping survey along a portion of that,
23 and there are areas where it gets fairly deep. You can go
24 out in hip waders, and people who go out in knee-deep boots
25 couldn't go in the areas I went to on River Des Peres in the

0108

1 summertime. So there are places where you can do that.
2 There are also places where another stream team coordinator
3 found that kids had dug out a hole in the River Des Peres to
4 great -- to increase the depth to play in.

5 CHAIRMAN HERRMANN: Excuse me, at what
6 location?

7 MR. SHERBURNE: Well, I know she works two
8 locations. One is on McKnight Road off McKnight Road at

9 River Des Peres.

10 CHAIRMAN HERRMANN: McKnight Road is way up in
11 the unclassified section.

12 MR. SHERBURNE: Well, there's.

13 CHAIRMAN HERRMANN: Nothing to do with the
14 classified section we're talking about here.

15 MR. SHERBURNE: Right, but so is Heman Park,
16 that's what we were just talking about.

17 CHAIRMAN HERRMANN: That's correct.

18 MR. SHERBURNE: So I'm bringing that in.

19 CHAIRMAN HERRMANN: And so is -- by the way,
20 so is Forest Park.

21 CHAIRMAN HERRMANN: And since in the later 80's, my
22 firm did an internal inspection of all of the sewers over
23 eight-foot diameter in River Des Peres system, and I had
24 people in there with breathing apparatus walking with waders,
25 walking those storm sewers, combined sewers, and checking out
0109
1 the structural stability and any hydrologic impediments. And
2 I'd like for that person who said he swam in the River Des
3 Peres in Forest Park to take me over there and point to the
4 place where Forest Park enters the surface. It doesn't.
5 It's all underground in Forest Park. Those are the people
6 who said they swam.

7 MR. SHERBURNE: I thought there were some
8 comment regarding the lower section saying that they had seen
9 or knew of people having swum there at some point in the
10 past.

11 CHAIRMAN HERRMANN: Well, one person said he
12 paddled in there.

13 MR. SHERBURNE: That's right.

14 CHAIRMAN HERRMANN: And paddling is not
15 swimming.

16 MR. SHERBURNE: But you can get wet, especially
17 if you're paddling a kayak. There are a variety of uses
18 people can make with things. I would like to also point out,
19 though, about that lower River Des Peres, there are a lot
20 of -- there's a lot of wildlife in that river. The
21 assumption is that it's a storm water sewer at best. There's
22 nothing more to it. It's simply concreted, it's
23 uninteresting, it's ugly, it's smelly. It's not quite true.

24 If you actually spend some time walking the
25 River Des Peres, which I had the good fortune to do, you'll
0110
1 find a lot of wildlife down there. You'll find a lot of --
2 there's a lot of things having washed into it. There's a lot
3 of things that make it interesting to kids. There are large
4 neighborhoods along both sides of River Des Peres. There's a
5 parkway along either side.

6 There's a new bikeway right at Morgan Ford
7 there that goes across bringing people to the area. It's an
8 area that could, with a little bit of attention, with some
9 plantings, with some clean-up, be a much more attractive
10 place, something that could be better integrated into that
11 area, and be more simply more attractive place to go. But I
12 tell ya, if I was a kid now who lived in that area, I would
13 be down in that creek, down river, rather, because it's

14 interesting. And there are places there that I could go to
15 get wet in the summer today, and it could be a nice place to
16 go. So.

17 CHAIRMAN HERRMANN: Okay. Thank you. I think
18 most of the wildlife down in Lemay comes out at night.

19 MR. STOBBER: I'd just like to have an
20 opportunity to address a few of the comments that were just
21 made. We selected, and as I think, if you've had a chance it
22 take a look at the use attainability analyses that were done
23 within the state during the rulemaking process and so forth,
24 I think you'll find that ours was -- I think we can say is
25 probably the most extensive work that was done.

0111

1 We did that because of the -- the potential
2 scrutiny, obviously, that this would be under, as well as MSD
3 wanted to make the most appropriate recommendations as
4 possible. So when we were given that task, we selected this
5 method of measurement of, again, these -- these criteria, to
6 try to make them as quantitative as possible, reproducible,
7 scientifically defensible, and so forth for average depth,
8 mean depths. The scientific community usually uses this
9 method to -- to derive that.

10 We did indicate the -- qualitatively, I would
11 suggest -- but indicate by eye the upstream and downstream
12 sections from our given transects. Those are documented into
13 our forms that we submitted. Those were typically runs. We
14 just do visual observations upstream and downstream similar
15 to what the majority of the UAA preparers did within the
16 state. I think you've also seen, I mean, based on the
17 extensive level of effort, we also did much more interviewing
18 and so forth than -- than what is -- what has been done in
19 other cases.

20 And lastly, I think related to the -- the
21 protection of these streams with potential for infection and
22 so forth, and secondary contact activities, you know, we
23 really needed to go back and take a look at what -- what
24 these water quality criteria were derived for, and those were
25 based on swimming exposures, primarily in the Great Lakes and

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1 so forth.

2 So, you know, I think we're stretching the
3 science if we think that -- that these criteria that have
4 been developed for this designated use would be applicable
5 for different -- different type uses, such as secondary
6 contact and so forth. And that's the reason why we have a
7 less stringent criteria for that. So other than that,
8 questions.

9 COMMISSIONER PERRY: I have one question for
10 you.

11 MR. STOBBER: Sure.

12 COMMISSIONER PERRY: Do you think that the
13 depth protocol needs to be more explicitly set out?

14 MR. STOBBER: I think that would be helpful. I
15 think this average, we've done several use attainability
16 analyses, this average depth criterion has been, to me, it's
17 somewhat -- it's -- we've got a quantitative number for a
18 qualitative process, essentially.

19 So I would hope that we would have a more
20 reproducible methodology that spells out exactly -- exactly
21 what we're talking about with that, so I think that's an
22 improvement that could be done for the next methodology
23 document, assuming that there's revisions to that one.

24 CHAIRMAN HERRMANN: Okay. Thank you, Trent.
25 Anything else? Yes, ma'am.

0113

1 MS. GRACE: My -- hi, my name is Anna Grace,
2 I'm the Educational Coordinator for Wild Ones Natural
3 Landscapers, and I'm working with Women's International
4 League for Peace and Freedom on Save the Water issues. We're
5 exploring the issue of water quality around the planet.
6 We're talking about the right of every being to have clean
7 water, rather than the need.

8 I would like to open -- staying with this
9 subject, but also about water quality, bring up the idea of
10 educating the public about land use, that if you scrape
11 everything clean and you have all these impervious surfaces
12 and there's runoff getting into the streams, not only do you
13 have a huge amount of runoff, but you also have a lot of
14 pollution.

15 And if people will use plantings on their
16 property, if they will border the streams and the rivers with
17 plantings, it will slow the pollution getting into the water,
18 it will save the river banks. I think we can, instead of
19 spending a million dollars putting chemicals into the water,
20 which is one way of doing it, we can educate the public about
21 how to use land and to preserve the quality of the water as
22 we go.

23 CHAIRMAN HERRMANN: Ms. Grace.

24 MS. GRACE: Yes.

25 CHAIRMAN HERRMANN: Excuse, I don't mean to be
0114

1 interrupting you, but we're dealing with a specific subject
2 here.

3 MS. GRACE: I know.

4 CHAIRMAN HERRMANN: And the Director has just
5 given me your card, and he had put on here for the public
6 comment period.

7 MS. GRACE: Okay. I'm just -- I didn't know
8 that, and I came in late, and I apologize.

9 CHAIRMAN HERRMANN: Okay.

10 MS. GRACE: But I may have to leave early, and
11 I just wanted to bring this subject up because if you're only
12 talking about million dollar projects with chemicals in the
13 water, which is one way of dealing with it, if we educate the
14 public, we could all be helping to preserve the streams so
15 that it would make it better for all of us. If we had a --
16 if we had a natural disaster and we were dependent upon our
17 streams, we would be in trouble.

18 COMMISSIONER PERRY: I agree with the
19 Chairman, this is kind of out of time -- out of place to
20 discuss this.

21 MS. GRACE: I'm going to sit down now.

22 COMMISSIONER PERRY: But I'd like you to go
23 back and look at some of the 319 grants that this Commission

24 has granted for exactly that sort of purpose.
25 MS. GRACE: Okay. Is there a place that I
0115
1 could put written comments?
2 COMMISSIONER PERRY: You can call the
3 Department and talk to them. And you can make public comment
4 at the end of these meetings.
5 MS. GRACE: Okay. What time would that be? I
6 have to go to work today.
7 CHAIRMAN HERRMANN: The way we're going, it's
8 likely to be a bit later this afternoon.
9 MS. GRACE: A long time. Okay. I'll just
10 make --
11 COMMISSIONER PERRY: That is something that we
12 do consider.
13 CHAIRMAN HERRMANN: Yes.
14 COMMISSIONER PERRY: And we actually give out
15 sizable grants to help people do exactly that.
16 COMMISSIONER PERRY: Okay. Maplewood,
17 Minnesota, Lake Felin (phonetic) Rain Gardens, if you look
18 that up, that's another way that people have handled these --
19 this project, this idea. Thank you.
20 CHAIRMAN HERRMANN: Thank you. And we'd be
21 happy to have a letter comment from you, Ms. Grace. Okay.
22 So the staff recommendation at this point, Phil, was to?
23 MR. SCHROEDER: With the, our staff -- the
24 staff's recommendation is that you not reaffirm your decision
25 that you made back to remove the use, but rather that you
0116
1 direct staff to work with MSD in looking at the other two
2 criterion, the criterion six of the substantial widespread
3 socioeconomic impacts.
4 You heard MSD say that it would be very
5 costly, and prohibitively, probably, costly, to be able to
6 provide treatment to meet water quality standards in these
7 creeks. And that may be just the justification that they
8 need to be able to prevail in criterion six, under the
9 UAA protocol.
10 And they also mentioned the fact that, I think
11 it was Trent mentioned the velocities in those creeks because
12 they've been hydrologically modified, that once the depths do
13 get to the point where we can all agree they're deep enough
14 to swim in, they're much too fast and much too dangerous to
15 provide a swimming opportunity. Again, that may fit nicely
16 within that criterion that talks about hydrologic
17 modifications. Maybe a better place for us to have some of
18 these discussions, rather than just talking about depth
19 alone. So ...
20 COMMISSIONER PERRY: Aren't we also talking
21 about evidence of people swimming?
22 MR. SCHROEDER: Yes, but I think we've kind of
23 covered that issue fairly well, with the original
24 UAA protocol being posted for public comment, with doing
25 these advertisements now, we have not yet received any
0117
1 comment that would lead us to believe that actual swimming is
2 occurring there.

3 COMMISSIONER PERRY: And that's my question,
4 so why would we not just want to --

5 CHAIRMAN HERRMANN: -- affirm our original
6 decision.

7 MR. SCHROEDER: Just simply because the depth
8 issue. We've talked about the fact that these meet the
9 average depth requirements. Obviously you can do what you
10 wish, but from the staff's perspective, we look at the
11 protocol, make sure that we rule or recommend in accordance
12 with the protocol, and that's simply the reason why we're
13 coming to you to say that we can't recommend removal because
14 it meets your protocol for attainability for swimming
15 purposes. But we would recommend that since we have no
16 evidence of existing swimming uses or occurring swimming
17 uses, there are other criterion that we could come back and
18 recommend use removal for. But that's up to you, obviously.

19 CHAIRMAN HERRMANN: Well, both of these
20 instances, it's been open for public comment twice, and
21 neither time have we had people who said they swam in either
22 of these two streams.

23 MR. SCHROEDER: That's correct. But again,
24 let's remember that there's two things that I think have to be
25 met -- two tests that have to be met in order to rebut the

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1 presumption. One is you don't observe any uses, you don't
2 actually observe people swimming in the water. Secondly, the
3 conditions of the stream, as you observe them, are not
4 suitable for swimming.

5 Now, if it's deep enough to swim in, without
6 any other evidence of chemical or physical nature of the
7 stream other than depth itself, we have to say that based on
8 the protocol, it meets the depth criterion for being
9 swimmable. So it's an attainable use. So far based on the
10 limited amount of information we've got. Now, that
11 attainability, though, may be impacted by the fact that it's
12 hydrologically modified, but we haven't gotten enough
13 information to say that to you.

14 That attainability may also be affected or
15 prohibitive based on the socioeconomic conditions of the
16 situation out there of trying to provide adequate treatment.
17 But again, we don't have that information to present to you.
18 So attainability is the issue.

19 The nonexistent uses or recurring uses, we
20 know based -- we're reasonably certain based on the
21 information we have, that there's no occurring uses. What
22 we're -- what we're wrestling with is the attainability of
23 that use. And depth doesn't meet the test, so should we --
24 should we look someplace else for meeting that test, those
25 other two criterion? That's what we're suggesting. I still

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1 see puzzled looks.

2 MR. GALBRAITH: Well, if we -- if the Commission
3 takes no action today, then your decision of September
4 stands.

5 CHAIRMAN HERRMANN: Okay.

6 COMMISSIONER HARDECKE: And you can go ahead and look at
7 those other issues.

8 MR. GALBRAITH: Yes, you can still direct us to
9 do that. Right. Correct. And that can be a motion or --
10 COMMISSIONER PERRY: So we encourage you to
11 look further into it?
12 VICE-CHAIRMAN MINTON: Do we have a motion on
13 the table?
14 COMMISSIONER PERRY: Do we have to motion
15 that?
16 CHAIRMAN HERRMANN: No, we don't need a
17 motion, right?
18 MR. BRYAN: No.
19 MR. SCHROEDER: Your wishes are in the minutes,
20 so that's good enough for us.
21 CHAIRMAN HERRMANN: We will affirm our last
22 decision.
23 MR. SCHROEDER: Okay.
24 CHAIRMAN HERRMANN: Okay.
25 MR. SCHROEDER: Well, may I take that
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1 directive both for River Des Peres and Maline Creeks, so we
2 can move on?
3 CHAIRMAN HERRMANN: From me, yes.
4 MR. SCHROEDER: Okay. So let's move on to the
5 Mississippi River then. The Mississippi River --
6 MR. GALBRAITH: Hold on a second.
7 MR. SCHROEDER: Okay.
8 MR. GALBRAITH: Lunch is here.
9 CHAIRMAN HERRMANN: Okay. So we have an
10 important thing to consider. We have -- do you have your
11 motion?
12 COMMISSIONER PERRY: Oh, sorry.
13 CHAIRMAN HERRMANN: Yeah. The mind can only
14 absorb what the behind can endure.
15 COMMISSIONER PERRY: I move -- are you ready for my
16 motion?
17 CHAIRMAN HERRMANN: Yes.
18 COMMISSIONER PERRY: I move that the Clean
19 Water Commission go into closed session to discuss legal,
20 confidential, or privileged matters under Section 610.021(1),
21 regarding personnel actions, subsection three, regarding
22 personal records or applications, and subsection 13, records
23 and 14, which are otherwise protected from disclosure by law.
24 VICE-CHAIRMAN MINTON: Second.
25 CHAIRMAN HERRMANN: Moved and seconded. Have
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1 any discussion? Hearing none, we'll go into closed session,
2 and we'll -- and recognize Commissioner Perry.
3 COMMISSIONER PERRY: Mr. Chairman, I was
4 thinking that maybe that direction we gave to staff before
5 should be on the record as an official motion, so therefore,
6 I would like to make a motion that this Commission give staff
7 the direction to investigate the River Des Peres further
8 under other sections of the UAA code.
9 VICE-CHAIRMAN MINTON: And Maline Creek.
10 COMMISSIONER PERRY: And I don't know how to
11 say that Maline? The other creek, Maline.
12 VICE-CHAIRMAN MINTON: Maline Creek.

13 COMMISSIONER PERRY: Maline Creek.
14 MR. GALBRAITH: So just so I understand, you
15 are directing -- you would like to direct staff to conduct
16 further study on the River Des Peres and Maline Creek.
17 CHAIRMAN HERRMANN: In conjunction with MSD.
18 MR. GALBRAITH: In conjunction with MSD for
19 the purpose of look at the other criteria.
20 CHAIRMAN HERRMANN: Clarifying all the
21 criteria in the UAA protocol.
22 MR. GALBRAITH: Okay.
23 COMMISSIONER PERRY: That is my motion.
24 CHAIRMAN HERRMANN: Okay.
25 COMMISSIONER HARDECKE: Second.

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1 CHAIRMAN HERRMANN: Moved and seconded. Any
2 discussion? Motion passes. Did you want to do a --
3 MR. GALBRAITH: Oh, yeah, I just wanted to
4 clarify one thing that was said earlier. Based on a
5 conversation I had at the break, Phil said to the Commission
6 that the Commission's word has the force of law, and I just
7 want to assure everybody that Phil's not a constitutional
8 lawyer, nor was he making a {laughter}-- rendering a legal opinion
9 there. I think he was just trying to reassure the Commission
10 that we take their directives seriously and try to implement
11 them.
12 COMMISSIONER PERRY: You're not retracting
13 that statement, are you?
14 MR. GALBRAITH: No, that was not a retraction, it
15 was a clarification. Thank you, Mr. Chairman.
16 CHAIRMAN HERRMANN: Thank you. I think we'll
17 move on to the next water body, Mississippi River.
18 MR. SCHROEDER: The Mississippi River is the
19 fourth of the four waters that we had sought additional
20 comment on with respect to whole body contact recreational
21 use. The segment of water that was -- that was placed in the
22 advertisement included 200 and a half miles of the classified
23 segment running from the St. Louis area all the way down to
24 the confluence with the Ohio River.
25 The segment that was subject to the use

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1 attainability analysis that was originally reviewed by staff
2 only included about 42 miles, which is basically within the
3 St. Louis metro area. Our original recommendation to the
4 Commission based on that 42 miles was that it was
5 inconclusive. We didn't have sufficient information to show
6 that the criteria were met, and MSD in their UAA presented
7 several criteria.
8 They presented Criterion One stating that some
9 natural sources would drive the bacteria levels above the
10 water quality standards at times. And in that, we didn't
11 feel like we had enough information to say that natural
12 sources alone were the cause of those exceedences. They also
13 presented some information with respect to the hydrologic
14 modifications made to the river, as in their affects on
15 recreational uses, and we felt that further information
16 needed to be presented to -- to show that the hydrologic
17 modifications do amount to a significant reason to remove the

18 use.

19 And we also -- they also presented some
20 information with respect to the potential for substantial
21 widespread socioeconomic impacts if full treatment was
22 provided or required under criterion six. And again, we --
23 we thought that additional information ought to be presented
24 in order to prevail under that criterion as well.

25 So our original conclusion was that the

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1 UAA was inconclusive, thereby not rebutting the presumption that
2 the whole body contact recreational use was attainable on the
3 Mississippi River. When the September Commission meeting was
4 held, the Commission ruled that the Mississippi River should
5 be removed from the whole body contact recreational uses or
6 use based on conditions that presented unsafe conditions for
7 swimming, a lot of that resulting from hydrologic
8 modifications and barge traffic and things that are inherent
9 to the Mississippi River.

10 In looking at the comments received from the
11 latest effort to obtain comments through the public notice,
12 it became fairly clear that there are swimming uses within
13 that 200-mile segment that were posted in the -- in various
14 papers up and down the river. And it's really based on that
15 finding alone that people do state to us that they use the
16 river for swimming purposes, that we must come to the
17 Commission and state that we feel that the whole body contact
18 recreational use must be retained on that segment of river.

19 Now, the one thing I think the Commission --
20 the staff would like to remind the Commission is that we are
21 looking at the entire 200 miles of the Mississippi River.
22 The Mississippi River has a lot of varying conditions up and
23 down that length. And again, I remind the Commission that
24 the original UAA was written on 42 miles within the
25 metropolitan area where some of those conditions may even be

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1 more prevalent.

2 What we're suggesting is similar to an
3 inconclusive, maybe, but it can't be inconclusive when you
4 have existing uses. So when we have existing uses, we must
5 come with the recommendation to retain the use. But what we
6 would recommend is that while it be retained, we would also would like
7 to work with MSD in looking at very specific, or more
8 specific, segments of the Mississippi River with respect if
9 there's certain segments that cannot be used for swimming or
10 swimming cannot be attained because of some of the things I
11 just mentioned, primarily hydrologic modifications, and the
12 potential for widespread substantial economic impact in those
13 areas where MSD's discharges enter the Mississippi River.

14 So again, our recommendation is that you
15 retain the use, but you also direct us to continue to study
16 the issue of looking at more definitive segments with MSD
17 that actually aren't being used for swimming and that are not
18 attainable for swimming because of -- of hydrologic
19 modifications or the socioeconomic impact.

20 CHAIRMAN HERRMANN: John or Jeff, do
21 you have a comment?

22 MR. THEERMAN: Thank you for the opportunity to

23 speak once again. The Mississippi River is of particular
24 interest to MSD. We have a great number of facilities on
25 that river, which is why we initiated a UAA analysis, and

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1 only for the portion of the river from North Riverfront Park
2 down to the confluence of the Meramec and the Mississippi.
3 It was our finding in the UAA that there was not recreational
4 use in that particular portion of the Mississippi River.

5 We acknowledge that whole body contact
6 recreation occurs above our study area, and we did not study
7 the segment below our study area. So we were only dealing
8 with the segment for the metropolitan area that I just
9 mentioned. Whole body contact standard for the Mississippi
10 River would have a substantial impact on our ratepayers. It
11 would be a significant reprioritization of capital dollars
12 that we anticipate receiving from our ratepayers in the
13 coming years to meet that kind of a standard.

14 Because we're not seeing recreational use in
15 the segment I mentioned, because the velocities in the river
16 are high, the barge traffic is common, we really are
17 concerned that this kind of a standard would be of very
18 little value to our ratepayers, and would reprioritize
19 dollars that are aimed at dealing with our issues in our
20 collection system that exist today, and many of those which
21 affect water quality. So again, I'm going to turn to John to
22 make a few comments about what he studied. I don't know if I
23 covered everything. John, you want to.

24 MR. LODDERHOSE: Thank you again. Yeah, I think
25 Jeff did a pretty good job of outlining our concerns here.

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1 What I see as the big issue here is maybe what needs to be
2 done is a smaller resegmentation of the Mississippi River.
3 I'm concerned, I suspect EPA and DNR staff are concerned,
4 with basing removing the use on this 200-mile section without
5 a UAA to cover the whole 200-mile section.

6 So I guess until we got some more information
7 of the downstream section, I would suggest that maybe segment
8 part in the St. Louis area according to where our UAA study
9 was and actually where our recommendation was, which was from
10 North Riverview Park down to the Meramec River. I think we
11 have pretty good data in that section to say there's not
12 substantial whole body contact, and that that use should be
13 removed, and it would take a modification of what you
14 originally proposed back in September in order to resegment
15 the river. So that would be our request.

16 And then to go further, to follow-up on what
17 we did on Maline Creek and River Des Peres, maybe a similar
18 addition to the motion would be that we continue to work with
19 Phil and his staff on looking at the economic factors of the
20 CSOs, and our discharges in that area is my request.

21 CHAIRMAN HERRMANN: Thank you, John. Anyone
22 else wish to make a comment? I see the reclassification of
23 the 200 and a half mile section of Mississippi River was done
24 kind of spontaneously, and without a great amount of thought.
25 The report of the Corps of Engineers recreational activity on

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1 the Mississippi River shows marinas and recreational

2 activities in the pools of Dam 24, 25, 26, and 27. It shows
3 no recreational activity, nor marinas from Dam 27 to
4 Kimmswick or Kaskaskia River. Those are the next
5 downstream activities, recreational activities.

6 So that, in concert with the report of the
7 Fish and Wildlife Service, which states very clearly critical
8 velocities for safe swimming, I think it's in order to
9 segment -- segment the original study area to a much more
10 confined area, and again, as John suggests, directing staff
11 to work with MSD to do a more complete study on this 42-mile
12 section. Is that appropriate?

13 COMMISSIONER HARDECKE: You want that in two motions, or
14 does it need to be.

15 CHAIRMAN HERRMANN: I think one.

16 COMMISSIONER HARDECKE: I make the motion to resegment
17 it, and to remove the use on the 42-mile section, and
18 whatever the legal description is.

19 CHAIRMAN HERRMANN: Order of.

20 COMMISSIONER HARDECKE: Mississippi River.

21 CHAIRMAN HERRMANN: Pending further study.

22 COMMISSIONER HARDECKE: Pending further study.

23 CHAIRMAN HERRMANN: Okay.

24 COMMISSIONER PERRY: For my knowledge, is 27
25 above the confluence?

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1 CHAIRMAN HERRMANN: No. Yes, I'm sorry. Yes.
2 No. 27 is downstream.

3 COMMISSIONER PERRY: 27 is downstream.

4 CHAIRMAN HERRMANN: Missouri River confluence,
5 yeah.

6 COMMISSIONER PERRY: Okay. 27, though, is
7 above the Meramec? I know where 24 and 25 are, I don't know
8 where 27 is.

9 CHAIRMAN HERRMANN: It's the Chain of Rocks
10 low water dam.

11 MR. THEERMAN: Mr. Chairman, we have a map, if
12 you'd like to see one.

13 COMMISSIONER PERRY: Yeah, that would help.

14 VICE-CHAIRMAN MINTON: Phil, in relationship
15 to the action that the Commission took concerning -- do we
16 have a second on that so I can continue discussion?

17 COMMISSIONER PERRY: I'll second it.

18 CHAIRMAN HERRMANN: Okay.

19 VICE-CHAIRMAN MINTON: Okay. Specifically
20 regarding the actions we took was to modify the uses from the
21 Ohio River up to Dam 27. How does that play out? All of a
22 sudden now we've segmented and Metropolitan Sewer District is
23 wanting to segment, but with regard directly to the actions
24 that we took, what was -- was it broken out, was the comments
25 broken out? I didn't see that.

0130

1 COMMISSIONER PERRY: Oh, is that the thing by
2 the stadium or something?

3 CHAIRMAN HERRMANN: No.

4 MR. SCHROEDER: What the Commission decided at
5 the September meeting was to retain the use down to Dam 27,
6 remove the use from Dam 27 down to the Mississippi River's

7 confluence with the Ohio River. That went into effect on
8 December 31st.

9 VICE-CHAIRMAN MINTON: Right.

10 MR. SCHROEDER: That will remain in rule until
11 further action or another rulemaking is done. What I think
12 we're suggesting here is that we go back and retain the use
13 on the Mississippi River from below the confluence of the
14 Meramec down to the Ohio River, or seek further information,
15 if you wish. But our staff's recommendation is that you
16 retain the use -- affirm, directing the staff to retain the
17 use down from the Meramec River down to the Ohio River.

18 But for the 42-mile segment that was
19 originally the subject of MSD's UAA, which is between Dam 27
20 and the Meramec River, look at that more specifically with
21 regard to existing uses, whether they exist or not, and
22 evidence suggests that they don't, but we'll look closely at
23 that, too, but look also at the substantial and widespread
24 socioeconomic impact to MSD if they were to have to provide
25 full treatment to meet water quality standards in that
0131 segment.

1 VICE-CHAIRMAN MINTON: Okay. So we're going
2 to cover the segment that -- that's being discussed by.

3 COMMISSIONER PERRY: 27 to Meramec.

4 MR. SCHROEDER: Yes.

5 COMMISSIONER PERRY: But I thought we had
6 originally gone all the way up to the confluence.

7 CHAIRMAN HERRMANN: That was the part we had
8 excluded.

9 VICE-CHAIRMAN MINTON: What segments, if any,
10 are then left undesignated -- or we've removed the
11 designation from all of them. Do you have any idea what --
12 how many miles, then, or what stretches are involved that
13 aren't covered by the motion that was just made?

14 MR. SCHROEDER: Yes. There's -- there's the
15 segment from the confluence with the Missouri down to Dam 27,
16 which the Commission had already voted to retain the use on,
17 our current rule effective December 31st, will retain whole
18 body contact down to Dam 27. From Dam 27 all the way down to
19 the confluence with the Ohio River, the Commission voted to
20 remove the use. Now, we came -- we did an advertisement to
21 get further input on Dam 27 down to the Ohio.

22 VICE-CHAIRMAN MINTON: Right.

23 MR. SCHROEDER: Where you removed the use. It
24 was suggested -- the information that we got that swimming does
0132 not occur before the Meramec -- confluence with the Meramec
1 River.

2 VICE-CHAIRMAN MINTON: And 27 to the Ohio.

3 MR. SCHROEDER: Well, not between Dam 27 and
4 the Meramec --

5 VICE-CHAIRMAN MINTON: Okay. All right.

6 MR. SCHROEDER: -- necessarily. But certainly
7 below the Meramec confluence down to the Ohio River, yes,
8 there's swimming that's been documented by the comments we've
9 received. The question remains, and what we're suggesting is
10 we look specifically at that 42-mile segment from Dam 27 down
11

12 to the Meramec River.
13 COMMISSIONER PERRY: Right here.
14 VICE-CHAIRMAN MINTON: Okay.
15 MR. SCHROEDER: Which was the original
16 focus --
17 VICE-CHAIRMAN MINTON: Dam 27 down to the
18 Meramec.
19 MR. SCHROEDER: Yes.
20 COMMISSIONER PERRY: See, that's the one
21 that's.
22 CHAIRMAN HERRMANN: Basically it's St. Louis
23 Riverfront.
24 MR. SCHROEDER: Yeah, within the St. Louis
25 metropolitan area, basically.

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1 COMMISSIONER PERRY: That's why I asked where
2 the 27 was.
3 VICE-CHAIRMAN MINTON: Okay. Go ahead now.
4 MR. SCHROEDER: Okay.
5 MR. LODDERHOSE: Just one more clarification, the
6 42 miles, actually, we went all the way up to the Alton pool,
7 and what we found there is people water skiing all the time,
8 and that's Class A, that's going to receive -- currently
9 receives the highest level (inaudible), and that's very
10 appropriate.
11 There's really just a 30-mile stretch that we
12 thought should be excluded, and that was from this North
13 Riverview Park, because they do kayak and they do the rolls
14 and the training and everything at this Chain of Rocks, or
15 Dam 27 area. So we thought you really needed to go a little
16 bit further downstream there, and then down to the Meramec
17 River. And that's about a 30-mile stretch, and that's the
18 area that I would really recommend.
19 COMMISSIONER PERRY: Okay. So is 27 south of
20 the Chain of Rocks?
21 MR. LODDERHOSE: 27 is right at.
22 CHAIRMAN HERRMANN: Barely.
23 MR. LODDERHOSE: Right at the Chain of Rocks.
24 CHAIRMAN HERRMANN: You'll see it as you go
25 across the bridge, look to your right.

0134
1 MR. LODDERHOSE: They're right there together.
2 MR. LODDERHOSE: Trent, you --
3 MR. STOBBER: Yeah, I was just going to say,
4 just like the Missouri River and so forth, we identified
5 where we found where there were current uses of the river for
6 whole body contact activities, and this North Riverfront Park
7 is the main point at which the kayakers that kayak down the
8 Chain of Rocks exit the river, so that's why we -- we
9 selected that point, but it's just -- it's just immediately
10 downstream of Dam 27, or Chain of Rocks.
11 CHAIRMAN HERRMANN: Used to be a front night
12 at the old golf course, which flooded very frequently.
13 MR. STOBBER: There you go.
14 CHAIRMAN HERRMANN: Okay. Any other comments?
15 Okay. We have a motion.
16 COMMISSIONER PERRY: And I seconded it.

17 CHAIRMAN HERRMANN: And you seconded it. Any
18 discussion?
19 MR. GALBRAITH: Can I clarify the motion?
20 CHAIRMAN HERRMANN: Yes, sir.
21 MR. GALBRAITH: That to -- to direct staff to, at
22 this next rulemaking to segment the Mississippi, as we
23 already discussed that, and to restore whole body contact to
24 the segment below the Meramec River to the confluence to the
25 Ohio.

0135
1 CHAIRMAN HERRMANN: Yes.
2 MR. GALBRAITH: But to keep that segment between
3 Dam 27 and the confluence of the Meramec not whole body
4 contact.
5 CHAIRMAN HERRMANN: That's the motion, right?
6 MR. GALBRAITH: Okay. Thank you.
7 COMMISSIONER PERRY: And our motion before we
8 started at 27.
9 MR. LODDERHOSE: Started a little further upstream,
10 but I'm concerned because that is where the kayakers do transfer.
11 MR. GALBRAITH: I'm sorry, now I'm unclear. I
12 thought I was clear.
13 MR. LODDERHOSE: You're right.
14 MR. GALBRAITH: 27.
15 MR. GALBRAITH: Which is it, North Riverview Park
16 or Dam 27?
17 MR. STOBBER: it's the Missouri
18 Department of Conservation North Riverfront Park.
19 MR. GALBRAITH: Okay. Thank you.
20 COMMISSIONER PERRY: This is.
21 MR. GALBRAITH: Thank you, Mr. Chairman.
22 CHAIRMAN HERRMANN: Thank you. Any
23 discussion? Anybody oppose the question? Would you please
24 call for the role, Diane -- or excuse me, Marlene? My mind's
25 back -- my mind's fading again.

0136
1 MS. KIRCHNER: Commissioner Perry.
2 COMMISSIONER PERRY: Yes.
3 MS. KIRCHNER: Commissioner Hardecke.
4 COMMISSIONER HARDECKE: Yes.
5 MS. KIRCHNER: Commissioner Kelly.
6 COMMISSIONER KELLY: Yes.
7 MS. KIRCHNER: Commissioner Minton.
8 VICE-CHAIRMAN MINTON: Yes.
9 MS. KIRCHNER: Chairman Herrmann.
10 CHAIRMAN HERRMANN: Yes. Okay. Move to Tab
11 four, FY2006, clean water state revolving fund intended use
12 plan, reference the Ozark Clean Water Company. Good morning.
13 MS. SCHULTE: Afternoon.
14 CHAIRMAN HERRMANN: Afternoon, thank you.
15 MS. SCHULTE: I'm Carrie Schulte, I'm
16 with Clean Water State Revolving Fund. Good afternoon,
17 Commissioners.
18 Just to give a little recap, in past IUPs,
19 we've always set aside for several years now, set aside some
20 monies for new nonpoint source initiatives. Likewise, the
21 2006 IUP, the IUP we're currently in, we set aside a million

22 dollars for new nonpoint source initiatives. Oh, about a
23 year or so ago, we went out and requested that -- that
24 whoever was interested send us a proposal for an onsite loan
25 program.

0137

1 One of the groups we received a proposal from
2 was the Ozark Clean Water Companies, a proposal from them,
3 and I think about two Commission meetings ago, we actually
4 had Ozark Clean Water Company come in and tell you a little
5 bit about their program and their proposal. We've since
6 received their application for \$500,000 of the one million
7 dollars that we've set aside in the IUP, and we'd like that
8 the Clean Water Commission accept their proposals -- their
9 proposal for the 500,000 that the Clean Water State Revolving
10 Fund put aside that -- that monies for Ozark Clean Water
11 Company to use in a pass-through loan program for onsite
12 systems.

13 CHAIRMAN HERRMANN: Shall we here from
14 Mr. Casaletto?

15 MS. SCHULTE: He is here.

16 CHAIRMAN HERRMANN: Yes, would you like to say
17 anything, sir?

18 MR. CASALETTO: I'll answer questions.

19 CHAIRMAN HERRMANN: Okay. Any questions of
20 either Ms. Schulte or Mr. Casaletto?

21 COMMISSIONER HARDECKE: Is this the only -- the only
22 request you have?

23 MS. SCHULTE: We have received a proposal from
24 MACOG, but they're still working on making their proposal the
25 best that they can. We're still working with them on that.

0138

1 COMMISSIONER HARDECKE: Who was that?

2 MS. SCHULTE: Missouri Association of Counsel
3 of Governments, I believe.

4 (End of Tape Two, Side Two.)

5 CHAIRMAN HERRMANN: Ready for a motion on the
6 matter of the Ozark Clean Water Company IUP inclusion.

7 COMMISSIONER HARDECKE: I'll make a motion to set aside
8 that money -- \$500,000 for them.

9 COMMISSIONER KELLY: Second the motion.

10 CHAIRMAN HERRMANN: Moved and seconded. Any
11 discussion?

12 COMMISSIONER PERRY: Yes, I'd like you to
13 refresh my memory a little bit, you know it's not very good.
14 This was -- if I remember correctly, was this for onsite
15 sewer?

16 MR. CASALETTO: Yes, to centralize systems, it
17 could be individual septic tanks, it could be a cluster
18 systems, small cluster systems. Depending on the size of the
19 flow, they could fall either under the department DNR's
20 regulation if they're over 3,000 gallons a day. Or less,
21 they could fall into the local health department's
22 jurisdiction. But they're not municipal systems. They're
23 either small clusters or individual systems.

24 COMMISSIONER PERRY: Which then gets to my
25 second question. Was this money not set aside for nonpoint

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1 source, and are septic systems considered nonpoint source?
2 MR. CASALETTO: Yes.
3 COMMISSIONER PERRY: Really.
4 CHAIRMAN HERRMANN: Any other questions?
5 COMMISSIONER PERRY: Does the Department offer
6 any oversight?
7 MS. SCHULTE: We will be involved, yes. The
8 next step would be draft agreement between their company and
9 the Clean Water SRF, so we know more about the
10 administrative and programmatic conditions, how we're going
11 to operate this.
12 COMMISSIONER PERRY: And then do you supervise
13 costs?
14 MS. SCHULTE: Exactly. What's eligible and what's not
15 COMMISSIONER PERRY: Like how much is used
16 actually makes the systems and how much goes to
17 administrative and do we have some sort of guidelines for
18 that?
19 MS. SCHULTE: That's the agreement that we'll
20 be drafting.
21 MR. CASALETTO: The set aside money is not
22 available to us, because there will be multiple projects,
23 each project will have to come before the staff and be
24 approved project by project. We're just having a pool of
25 money available, and then each specific project, is the way I
0140
1 understand it, would then have to be approved project by
2 project by staff.
3 COMMISSIONER HARDECKE: I believe I understood that this
4 500,000 would all go for the systems, there wouldn't be any
5 administrative out of that; is that right?
6 MR. CASALETTO: Well, there might be some small
7 administrative money. I mean, we discussed in a few
8 Commission meetings ago that there was going to be a one
9 percent fee from DNR, which was interest, and we talked about
10 a one percent administrative fee that we called interest, at
11 that time. And they said you can't really -- we couldn't
12 really charge interest, so a very small administrative fee.
13 Again, that would be worked on in the agreement with DNR, but
14 would be -- it would be along that line, the one percent
15 range for administrative.
16 VICE-CHAIRMAN MINTON: The majority of it would go to
17 the --
18 MR. CASALETTO: Fixing systems.
19 MS. SCHULTE: Our intention is to deliver to
20 the eligible people out there that are having problems, that
21 are having failing systems, the lowest cost they can get as
22 far as borrowing money, the lowest interest available. We
23 want to keep it as low as possible.
24 CHAIRMAN HERRMANN: Your principle scope of
25 activity is in and around Kimberling City, right?
0141
1 MR. CASALETTO: Kimberling City, Branson area.
2 CHAIRMAN HERRMANN: Okay. Yes. Okay. Any
3 other questions? If there's no questions, we'll consider it
4 a motion passed. Thank you. Thank you, sir.
5 COMMISSIONER PERRY: We had another question.

6 COMMISSIONER HARDECKE: I think you indicated before,
7 this money, once it's paid back, then once that is used up,
8 then you will have to come for a new -- a new amount.

9 MR. CASALETTO: It will go back to DNR. They
10 will either -- they can do whatever -- use it for other
11 projects or whatever.

12 MS. SCHULTE: I envision it operating similar
13 to -- we already have what we call a pass-through loan
14 program with the Department of Agriculture, and once the
15 project's completed, they send the invoices to us. We go
16 ahead and pay for that particular project, and then I think
17 it's once a year at Department of Agriculture will pay us our
18 principle and interest.

19 CHAIRMAN HERRMANN: Okay. On the advice of
20 counsel, I think we should have a roll call vote, so would
21 you please call for the vote, Marlene? Got it right that
22 time.

23 VICE-CHAIRMAN MINTON: Yeah.

24 MS. KIRCHNER: Commissioner Kelly.

25 COMMISSIONER PERRY: Yes.

0142

1 MS. KIRCHNER: Commissioner Minton.

2 VICE-CHAIRMAN MINTON: Yes.

3 MS. KIRCHNER: Commissioner Perry.

4 COMMISSIONER PERRY: Yes.

5 MS. KIRCHNER: Commissioner Hardecke.

6 COMMISSIONER HARDECKE: Yes.

7 MS. KIRCHNER: Chairman Herrmann.

8 CHAIRMAN HERRMANN: Yes. Thank you.

9 COMMISSIONER PERRY: Excuse me, can I also
10 make a request? Since this is something sort of unique to
11 us, would you come back in six months and give us a status
12 report?

13 MR. CASALETTO: Definitely, definitely, yes.

14 COMMISSIONER PERRY: Thank you.

15 MR. CASALETTO: Thank you.

16 CHAIRMAN HERRMANN: Moving to Tab No. 5,
17 Public Water Supply District No. 1, Knox County, city of
18 Baring.

19 MR. LAUX: Good afternoon, my name is Richard
20 LAUX, I work for the department. This is another
21 one of the lagoon variances that we've seen a number of
22 before. This one happens to be from the Public Water Supply
23 District No. 1 of Knox County, and it regards the Baring
24 south lagoon. It's an existing facility which is in need of
25 upgrade. It's having an affect on the receiving stream at

0143

1 this point.

2 A water quality study has not been performed,
3 and the design engineer wishes to utilize a lagoon system, an
4 upgraded lagoon system. Staff is recommending preliminary
5 approval of the request with the inclusion in the operating
6 permit of instream monitoring and a reopener clause should
7 the lagoon not adequately protect water quality, which is
8 very similar to the other recommendations we've made.
9 And I'm not sure if there's anybody here from the district or
10 not.

11 CHAIRMAN HERRMANN: No, let's see. What's the
12 population?
13 MR. LAUX: The population of Baring is -- if
14 my recollection is right, it's about 150 or so, a little over
15 that.
16 CHAIRMAN HERRMANN: That's what I --
17 MR. LAUX: It may have grown recently, but not
18 much, I'm sure.
19 CHAIRMAN HERRMANN: And the receiving stream?
20 I've forgotten.
21 MR. LAUX: Is an unclassified stream that's
22 tributary to another unclassified stream, which then goes to
23 one of the branches of the Salt River.
24 CHAIRMAN HERRMANN: Salt River. Okay. Any
25 questions of Mr. LAUX? Hearing none, Chair would entertain a
0144
1 motion relative to staff recommendation on the city of
2 Baring, or village. It's a village, isn't it?
3 MR. LAUX: I believe so.
4 COMMISSIONER PERRY: I move that the Clean
5 Water Commission accept the staff recommendation and grant
6 preliminary approval of the variance with the recommended
7 conditions, and then staff is directed to public notice the
8 intention of the Commission to grant final approval at the
9 March meeting.
10 COMMISSIONER HARDECKE: Second.
11 CHAIRMAN HERRMANN: Moved and seconded. Have
12 any discussion? That motion is passed.
13 MR. LAUX: Thank you.
14 CHAIRMAN HERRMANN: Thank you, Richard. Moving
15 to Tab 6, Hutchinson Salt Company, and Kevin Mohammadi
16 will present the staff's opinion.
17 MR. MOHAMMADI: Thank you, Mr. Chairman,
18 members of the Commission. Hutchinson Salt Company operates
19 a sodium chloride transfer facility on a rail spur for its leases
20 from Burlington North Santa Fe Railroad. Sodium chloride
21 is brought in a railcar and transferred onto trucks for
22 transport to Missouri Department of Transportation
23 facilities.
24 Storm water from this facility discharges to
25 an unnamed tributary to Walt Disney Lake, which is owned by
0145
1 the city of Marceline. In August, 2002, staff investigated a
2 fish kill in the lake and analysis of the water samples from
3 the lake revealed chloride levels significantly exceeded the
4 Water Quality Standards, acute criteria for chloride. At the
5 time of the fish kill, the company maintained the stockpile
6 of sodium chloride at their facility that was exposed to the
7 weather.
8 Since this incident, the company removed this
9 stockpile, removed the contaminated soil, and obtained an
10 operating permit for the facility in April, 2003. The
11 company entered into a Settlement Agreement in March of 2004,
12 that resolved violations associated with this fish kill.
13 As part of this Settlement Agreement, the company is
14 implementing a department approved monitoring plan to
15 document chloride levels in the lake.

16 In recent inspections conducted on August 15,
17 October 17 and 19, 2005, department staff observed several piles of
18 sodium chloride that were spilled during offloading.
19 Analysis of two samples obtained by staff at the outfall
20 indicate chloride levels significantly exceed the permitted
21 effluent limitation and quarterly Discharge Monitoring Reports also
22 indicate that discharges violated the permitted effluent
23 limitation for chloride in April and July of 2005.

24 Based on August 15 inspection,
25 the Department has issued the company a Notice

0146

1 of Violation. The Department also issued Notice of
2 Violations for ongoing violations documented on October 17
3 and 19. Staff recommends the matters be referred to the
4 Office of Attorney General's office for appropriate legal
5 action.

6 CHAIRMAN HERRMANN: Anyone here from
7 Hutchinson Salt Company?

8 MR. SCHMITKINS: Yes, Mr. Chairman. My name's
9 Gene Schmitkins, I'm with the law firm of Lathrop & Gage. We
10 will be representing Hutchinson on this. We did not, excuse
11 me, have any of our -- our clients not attended. Subsequent
12 to letter we received from the director about this action
13 that was going to take place today, we received a letter from
14 the Attorney General's Office requesting that we meet, and my
15 understanding is that that's already taken place, so we don't
16 have anyone here to talk about this, because this seemed to
17 be a perfunctory action, as that it appears it's already been
18 referred to the Attorney General's Office, and we're already
19 engaged in discussions with them.

20 As I understand it, my partner, David Shorr,
21 is the lead counsel on this, so I'm just here to kind of make
22 sure, see what happens, but our understanding is it's already
23 been referred, so -- or at least the Attorney General's
24 already involved.

25 CHAIRMAN HERRMANN: Can you comment on that?

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1 MR. MOHAMMADI: Yes, Mr. Chairman. Obviously,
2 as I indicated earlier, there was a settlement agreement
3 entered in this matter that's Department of Natural
4 Resources, the company, and Attorney General Office signed
5 off on this settlement agreement. Therefore, Attorney
6 General Office was signatory to that agreement.

7 When the staff observed the violation of
8 settlement agreement, notified Office of Attorney General
9 office asking them to send a letter to the company explaining
10 to them that there is violation of settlement agreement, and
11 they need to address. That does not mean that matter has
12 been already referred.

13 CHAIRMAN HERRMANN: Okay.

14 COMMISSIONER HARDECKE: Did you get any response from the
15 company after your -- your notice?

16 MR. MOHAMMADI: No, we have not. I also need
17 to indicate, Mr. Chairman, that the company also has failed
18 to submit discharge monitoring report that is required under
19 the permit, and number of the monitoring reports that they
20 have failed to submit is 9 out of 11 reporting period.

21 CHAIRMAN HERRMANN: Monthly reporting?
22 MR. MOHAMMADI: Quarterly reporting.
23 CHAIRMAN HERRMANN: Quarterly reporting. Nine
24 out of 11 have not been submitted?
25 MR. MOHAMMADI: That's correct.

0148
1 CHAIRMAN HERRMANN: Okay. Any other
2 questions?
3 VICE-CHAIRMAN MINTON: Mr. Chairman, I make a
4 motion to refer the matter to the AG's office.
5 COMMISSIONER PERRY: I'll second it.
6 CHAIRMAN HERRMANN: Okay. Moved and seconded.
7 Any discussion? Hearing no discussion, the matter will be
8 referred to the Attorney General's Office.
9 MR. MOHAMMADI: Thank you.
10 CHAIRMAN HERRMANN: Thank you. Water quality
11 standards update, Tab 7. Phil's on that once again.
12 MR. SCHROEDER: As I said earlier, the rules
13 that were adopted by the Clean Water Commission back in
14 September have gone into effect as of December 31st, 2005.
15 We are now at the point where we can begin our submission or
16 go ahead and make our submission to EPA in terms of a program
17 amendment.
18 Some of the things we discussed today, I think
19 is important to probably convey to EPA along with our letter,
20 to let them know that we're thinking in the future on some of
21 these issues. We also know that there are a few issues of
22 concern with EPA. We haven't anything for certain in terms of
23 how they'll rule on this -- this package, but there are some
24 things I think we'll have some further discussion on.
25 One of them being the bacteria criteria, about

0149
1 548 colonies that we talked about at previous Commission
2 meetings, and so looking forward to making that submission
3 and getting EPA's response.
4 MR. GALBRAITH: We'll be sending that shortly
5 within days, along with your recommendations on the four
6 water bodies that we were discussed under Tab 2 -- or 3.
7 CHAIRMAN HERRMANN: We're not included in
8 7.031, the tables -- tables A through H?
9 MR. SCHROEDER: All of the modifications to
10 the rule should be in your packet there. Are they not
11 included?
12 CHAIRMAN HERRMANN: No.
13 COMMISSIONER PERRY: It's the rule, it's not
14 the tables.
15 CHAIRMAN HERRMANN: It's the rule itself, it
16 doesn't have any of the table.
17 MR. SCHROEDER: Is it just the final order of
18 rulemaking.
19 CHAIRMAN HERRMANN: Yep.
20 MR. GALBRAITH: Yes, it was.
21 MR. SCHROEDER: Oh, my apologies. I guess
22 what we presented in the packet was just the narrative
23 section of 7.031.
24 CHAIRMAN HERRMANN: Right.
25 MR. SCHROEDER: The -- the rest of the rule is

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1 available on our website, and it's also available on the
2 Secretary of State's website, if you would like to take look
3 at it there.

4 MR. GALBRAITH: Would you like us to mail hard
5 copies to each of the Commissioners? We'd be happy to do
6 that.

7 MR. SCHROEDER: Or we could do that.

8 CHAIRMAN HERRMANN: Yes.

9

10 CHAIRMAN HERRMANN: Yeah.

11 MR. GALBRAITH: You bet.

12 CHAIRMAN HERRMANN: Thank you. Tab 8, State
13 Revolving Fund. Doug Garrett.

14 MR. GARRETT: Good afternoon.

15 CHAIRMAN HERRMANN: Good afternoon.

16 MR. GARRETT: In November of last year, we had
17 our fall loan closing. It was rather uneventful, from our
18 standpoint, which is always a good thing. The average
19 interest rate for all the communities was 1.37 percent. If
20 you turn to Page 646 in your packet, there's a list of
21 communities that participated in the par amount of their
22 loans.

23 In addition, the -- we realized the premium
24 during the closing on the bonds, and that premium was
25 distributed to the participants based on their desires for

0151

1 the premium funds. The one unique item with this closing
2 that we did, in the past, for closings, we would require the
3 participants to have special council meetings to adopt
4 resolutions to go forward with closing. This became
5 problematic with the communities in scheduling things.

6 In fact, a couple years ago when we did a
7 closing with the city of Columbia, it was during spring break
8 that they would have had to have their council meeting, so we
9 had to adjust closing to accommodate the city of Columbia,
10 and they were a sizable participant at that time. So with
11 this closing, bond council recommended that we have the
12 communities pass an inducement resolution whereby -- or
13 parameters resolution whereby the communities could go ahead
14 and give their okay to going through with the closing as long
15 as the closing fell within certain parameters.

16 The feedback we have received from the
17 communities on that, as well as finance team, has been very
18 positive, and we will be carrying that forward in our future
19 closings to give some relief to the communities on last
20 minute items that they have to deal with. Unless there's any
21 questions.

22 CHAIRMAN HERRMANN: No questions? Thank you
23 Doug. Tab 9, update of timeliness of permit actions.

24 MR. GALBRAITH: Well, obviously I'm not Peter
25 Goode, and haven't been for some time, although I may be more

0152

1 so in the future. If you didn't know already, Peter Goode
2 has left the department, he's working for Washington
3 University, and he started that job yesterday, or Tuesday
4 rather, so yeah, I guess that was yesterday, so we wish him

5 good luck and wish him well and we're going to miss him.
6 So I am here to try to, however inadequately,
7 fill his shoes. This -- this performance report, you may
8 remember, is one that we typically gave to the Commission on
9 a fairly regular basis. I discontinued it because I felt the
10 data was not -- I didn't think it was good data, and we spent
11 some time in the past, eight or nine months, trying to
12 improve the data and improve the data input, and there were
13 some -- there were some basic flaws in the programming that
14 we've been working on.

15 It's still not -- this report is still not in
16 the shape that I would like it to be. I think it's kind of
17 cryptic. It doesn't really -- you really have to be
18 intimately familiar with all these different terms to know
19 what it's saying, but I'll give you a few examples, with the
20 commitment that next time we'll have a more readable version
21 that spells out more clearly what each of these categories
22 are, but I'll give you just a few, just for point of
23 reference.

24 The second permit type -- and the reason these
25 are the way they are, they're part of a permit system that

0153

1 cuts across all our permitting programs, so it's not just
2 water, it includes air and hazardous waste and solid waste
3 and so forth. So it's not -- it's not water specific, and
4 that's why you have these sort of cryptic terms like CP with
5 GP, no PN. Well, what that means is construction permit with
6 a general permit that doesn't require public notice.
7 That's the second type. That's typically like a CAFO
8 general permit, okay?

9 The one after that construction permit without
10 an operating permit, that would be at a sewer extension would
11 be a typical example of that, and you can see that we do 800
12 or -- between eight or nine hundred of those a year. The one
13 after that is construction permit requiring public notice of
14 a general permit. That would be a different type of CAFO,
15 like a side specific -- well, not a side specific CAFO, but
16 a construction permit on a CAFO. The one after that,
17 construction permit with site specific operating permit, that
18 would be your typical treatment plant, SRF project, and so on
19 and so forth.

20 On the next page, the -- the second one, which
21 is a general permit of an operating permit, you can see the
22 big numbers there, and 21, 2200 a year, those are basically
23 storm water permits, storm water general permits. And the
24 one after that would be, again, a general permit that does
25 require public notice. Those are some kind -- some general

0154

1 permits require public notice and some don't. The -- so be
2 that as it may, I think what this is showing is, you know,
3 for the most part, we're meeting our 60-day and 180-day time
4 frames.

5 I think the next report that I'll show you
6 will outline each one of these categories, describe more
7 completely what it is, what the time frame is that we're
8 required to meet, and then show you the average number of
9 days, and I don't think you really need to know the number of

10 days to the millionth place, so we'll probably change that as
11 well. But this is one of these push a button, get a report
12 type of things, and it's not easy to change, and you have to
13 work with several layers of bureaucracy to get it changed.
14 So we'll continue to try to improve that.

15 I might mention that our -- our backlog
16 permits remain -- and this is backlog of operating permits
17 and renewals. Obviously those numbers aren't reflected in
18 this report because if they're backlogged, they don't have an
19 end date on any of these, so they're not -- the data -- I
20 just need -- to clarify, the data is a little skewed in that
21 it doesn't include things that are backlogged and out of
22 our -- so we're still hovering right around 55 -- I mean 550
23 to 560 backlogged renewals and permits, which is below the
24 EPA goal of ten percent, but still above our goal of two
25 percent. It's around -- it's around four percent of the

0155

1 total permit actions a year on the operating permit side.

2 I do want to mention that -- that one of the
3 things that Peter and Refaat did towards the end
4 of, you know, well actually, they started in the summertime,
5 compiling a list of the important permits that they wanted to
6 get out by the end of the year, and they really focused hard
7 on a list of many of the major permits that had been pending
8 for longer than they should have, including four MSD permits,
9 three permits for city of Kansas City, Moberly, Macon,
10 Marshall, Trenton, and then a host of lesser municipalities,
11 so we really worked hard to try to get our municipals
12 up-to-date in their permits as much as possible.

13 And I'm proud that they made their goals, and
14 worked up until four o'clock on Friday to -- to get some of
15 them out the -- finally out the door. So I just want to
16 recognize their -- their performance on that, and recognize,
17 again, the value of setting goals and -- and I would, like I
18 said before, I'd rather set a high goal and maybe miss a
19 little bit than founder around for lack of setting any goals
20 at all. So any questions on -- on that?

21 CHAIRMAN HERRMANN: Number 10, which you're
22 still Peter Goode.

23 MR. GALBRAITH: I am still Peter Goode. This is
24 a draft guidance on lagoon permitting. This is an issue that
25 we brought before the Commission a couple of times. We

0156

1 spelled out the problem, I think fairly clearly, that there
2 are a number of lagoon permits out there that were issued
3 without the benefit of a -- of a water quality study, as
4 required by regulation.

5 This is our attempt to try to close the gap
6 between regulation and practice. We recognize that the
7 Commission has directed us to address the flows of twenty-two
8 five or less through rulemaking, so that we haven't lost
9 sight of that but in the interim, we know that we need to --
10 to continue to address these until the regulation is changed.
11 Basically what -- what -- there's a flowchart here.

12 It's a little bit complicated, but the -- what
13 it boils down to is for -- for existing permits, when the
14 renewals come up, if they haven't performed a study but they

15 want to retain the higher lagoon limits allowed for in
16 regulation, then we'd like to include some monitoring in
17 their next permit cycle, and then that monitoring will --
18 instream monitoring will constitute the study and fulfill the
19 requirements of the study by actually seeing what the impact
20 of that facility is on that stream.

21 For new permits, we feel that a -- some kind
22 of a study up-front is appropriate, and we will require that
23 further regulation. We've had some discussions with some of
24 the -- our permitting engineers who are experts on this, and
25 we understand that sometimes the -- the models used for this

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1 kind of a study for larger flows are not appropriate for
2 smaller lagoon systems, so we're working on -- on ways to
3 develop the criteria for that report so that we can all go
4 through the permit process and issue permits with a
5 reasonable level of comfort by all that the effluent will be
6 protective of stream quality, and I think that's in the
7 interest of not only the department, but the professional
8 engineers and communities that -- that want these.

9 I think the important message is that permit
10 -- lagoon systems can be, have been, and will continue to be
11 part of our wastewater treatment solutions in Missouri.
12 They're preferable to more complicated systems for a number
13 of reasons. We just want to make sure that they're done
14 right, that they protect water quality, that we follow our
15 regulations, and I think this policy is a major step in
16 getting to that goal. This policy is currently out for
17 review by a group of internal stakeholders.

18 We certainly welcome comments from either the
19 Commission or anybody, and we hope to take this up in one of
20 our regulatory advisory groups that was identified previously
21 during the Clean Water Forum. So they'll be -- there will
22 still be a couple months of -- of review comment, and
23 refining this. Questions?

24 CHAIRMAN HERRMANN: Yeah, I'll ask the age-old
25 question.

0158

1 MR. GALBRAITH: Where are you going to monitor.

2 CHAIRMAN HERRMANN: Where are you going to
3 monitor?

4 MR. GALBRAITH: The first relevant water body.

5 CHAIRMAN HERRMANN: You've got a discharge to
6 an unclassified stream, and it's mile, two miles to the
7 receiving stream, the major receiving stream, where are you
8 going to monitor?

9 MR. GALBRAITH: Well, the simple answer is we're
10 going to monitor the first place where those standards apply,
11 okay? So it would have to be the first classified segment.
12 That -- it's sort of tied up with this whole issue of
13 effluent-dominated and effluent-dependent streams, and that
14 discussion will go on in parallel. But for purposes for
15 permitting from here forward, it's going to be at what I call
16 the first relevant water body, which is in most cases the
17 first place where the water quality standards apply.

18 CHAIRMAN HERRMANN: Where you may have an
19 impact on the quality of a water in that stream?

20 MR. GALBRAITH: Correct.
21 CHAIRMAN HERRMANN: Yeah. Okay.
22 MR. GALBRAITH: While I'm up here, if Bill
23 doesn't mind, I might just skip ahead to the Director's
24 report, and then I'll just sit down once. I don't have a lot
25 to report on. I did mention, of course, that Peter Goode
0159 is -- has moved on. I'll talk a little bit about our fee
2 issues.
3 We have met four or five times with the
4 stakeholders on water pollution permit fees. We've presented
5 data of, stakeholders have asked questions. It has not -- I
6 would say we're not close to a -- a position that -- that can
7 be endorsed by a wide variety of stakeholders. Our last
8 meeting was on November 29th, and we were asked to produce a
9 list of five scenarios or several scenarios of funding and
10 service. So at a level funding, at such and such increase,
11 such and such increase, what level of services does the
12 Department think it could provide in terms of timely permits,
13 monitoring network and so on and so forth.
14 The program has put together those scenarios,
15 they're currently under review by my management chain. My
16 goal is to get those posted to the -- to our website -- we
17 have a special website for fee stakeholders -- this week, and
18 hopefully begin discussions with them in the weeks to come,
19 very soon, so that we can bring to the Department Director
20 some kind of a -- legislative package that looks like it
21 would have a reasonable -- reasonably broad level of support,
22 especially among those who have to pay the fees, but we're
23 not -- we're admittedly a little bit behind the time here,
24 given that it's, you know, the first week in January, but I
25 think there's still -- we're not out of the running yet, and
0160 there's still time to take this up, so. And that's it for
2 the director's report. Can I answer any questions?
3 CHAIRMAN HERRMANN: Thank you, Ed.
4 MR. GALBRAITH: Okay.
5 MR. BRYAN: In 2005, we had 13 lawyers in our
6 office that worked on Clean Water Commission matters. We
7 completed 42 cases, and opened 60 new cases, including 28
8 that were referred by this Commission. We resolved -- of
9 those 42 cases, 34 of those cases were resolved by
10 out-of-court settlements. Six of those cases were all in the
11 White River basin as part of our Attorney General Nixon zero
12 tolerance initiative for water quality protection in the
13 White Water basin.
14 In those cases, we recovered a little over
15 \$1.4 million in actual damages, which covered the agency's
16 costs, the Department of Natural Resources' cost, not the
17 Attorney General's cost, the cost of associated with the fish
18 kill, Department of Conservation costs, and investigative
19 costs, and payments to the Natural Resources Protection Fund
20 for damages to natural resources of the state of Missouri.
21 And in addition, we recovered a little over \$323,000 in civil
22 penalties.
23 It was a good year, it wasn't our best year,
24 but we did -- there was a cop on the beat, and if you have

25 any questions about any of those cases, specifically or in
0161

1 general, just let me know.

2 CHAIRMAN HERRMANN: Thank you, Bill. Next --
3 we'll end the agenda booklet is a Festus Crystal City
4 presentation.

5 MR. BREEZE: Mr. Chairman, members of the
6 Commission, I'm Kurt Breeze, I represent the Festus Crystal
7 City Sewage Commission and the citizens of Festus and Crystal
8 City. Thank you for an opportunity late in the day to
9 address you on this topic.

10 We're essentially here for informational
11 purposes to give you a heads-up as to where we are, tell you
12 where we've been a little bit, and hopefully alert you to
13 where we are going. Essentially, as it says on the calendar,
14 we're looking at the possibility of a variance extension or a
15 variance modification with respect to a 208 requirement that
16 the cities from their sewage treatment plant extend the
17 pipeline for effluent to the Mississippi River.

18 It currently discharges to the Platent Creek
19 (phonetic), which is about two miles from the confluence of
20 the Mississippi River. That requirement arises from a policy
21 back -- set back in the 70's, at a time when Festus/Crystal
22 City had an ancient and aging sewage treatment facility, and
23 it was probably expected that we could not meet necessarily
24 effluent standards, and so we think philosophically, the
25 approach was probably to say pipe it to the Mississippi, and

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1 that will be that.

2 In the meantime, however, the sewage
3 Commission and the citizens of the two cities have, Under a
4 five-year variance that we got from you in 2001, for more
5 lenient levels of effluent total ammonia have constructed, at
6 a cost of seven and a half million dollars, a brand new
7 sewage treatment facility that is a state of the art
8 facility. That facility, in addition, is constructed behind
9 a \$12 million flood protection levee. The cities have spent
10 a significant amount of Money as well, another 12 million
11 dollars for which they've taxed themselves, to construct a
12 new portable water treatment facility in the twin city areas.

13 The good news is that the twin cities is -- we
14 think a shining star, and a good example for your
15 Commission's enforcement activities, and that is that we now
16 have a current state of the art facility that is meeting, and
17 indeed far exceeding, the allowable levels, or far below
18 them. And it is at this point, capable of discharging to the
19 Platent Creek, at a level that should be acceptable.

20 We have recently been told that a new current
21 requirement is going to be that we disinfect the effluent
22 from our new plant to meet the bacterial standards on
23 Plantent Creek. We understand that when we agreed to the
24 variance that you gave us in 2001, that we fully intended as
25 a part of that variance plan to build a pipeline to the

0163
1 Mississippi River for that effluent. Understand, however,
2 today, that we believe that the plant is producing an
3 effluent quality which, when disinfection is added, will

4 enable us to discharge on a continuing basis at a
5 satisfactory level to Plantent Creek.

6 And we're asking, as it comes down the pipe,
7 that you evaluate whether or not we are still required to
8 place a pipeline to the Mississippi River. The problem is
9 that that pipeline would be a two-mile pipeline, that it
10 would extend through a superfund site of significant size,
11 which is the PBG facility, that the city does -- the cities
12 do not want to acquire any ownership interest in a superfund
13 site. You can understand why we have a concern in terms of
14 being involved in that.

15 It may well, from an engineering design point
16 of view, be a discharge pipeline that at least in some parts
17 is exposed, and not in the ground. There obviously would be
18 soil contamination issues to deal with in the construction of
19 that pipeline, and the total cost of a pipeline, as we
20 currently project it, as compared to what it was projected to
21 be back in the 70's, would probably exceed by ten times the
22 cost of the disinfection process that we are currently
23 attempting to design and implement at the plant as it
24 currently exists. So from a cost profit analysis point of
25 view, we think over its long view, that it's not going to

0164

1 make sense to make us build a five or six million dollar
2 pipeline to the Mississippi River to discharge effluent that
3 can be discharged into the Plantent Creek.

4 And although this isn't an issue in front of
5 the body at this point in time, Plantent Creek is a whole
6 body contact stream at this point. It's not accessible by
7 anybody. I've lived in the twin cities my 56 years and I've
8 never seen anybody swim in it, but that's a different matter
9 altogether. The point is simply that from a cost analysis,
10 the extension of a pipeline doesn't seem to fulfill any
11 benefit to the public or to anyone.

12 It just costs more money, and the cities
13 already strapped itself with \$30 million worth of bonded
14 indebtedness to build the things that we built to give the
15 results that we've given. Obviously I don't have charts and
16 specifics here to show you that. I do have Mr. Dave Smith
17 here, who's the Plant Manager, if there are any questions
18 about that. But I assure you that it is a shining star of a
19 facility.

20 And again, our purpose here being
21 informational only is just to tell you that your staff has
22 been extremely helpful to us in get to go this stage that we
23 anticipate because of the need to design and install the
24 disinfection process that we are probably going to have to
25 ask for some extension of time under the current variance

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1 limits. We anticipate you will not be disturbed by that
2 because the effluent quality is so good.

3 And we specifically invite each and every one
4 of you to personally come down and look at the facility. It
5 particularly will be helpful when and if the variance
6 requests comes in front of you to understand the lay of the
7 land down there, and that -- and in essence, this captured
8 sewage treatment plant, which is behind the levee, if

9 required to extend a pipeline, is going to be extending a
10 pipeline across a very unsuitable area through wetlands, and
11 down the Mississippi, which means we'd have to across the
12 Plantent Creek with an expense that would probably be
13 untenable. And again, we don't think you'd get a result from
14 that that is actually in keeping with your desire.

15 Again, I appreciate your hearing me out today.
16 If you have any questions about that or if there are
17 technical nature, I'll ask Dave to answer them.

18 COMMISSIONER PERRY: I have two.

19 MR. BREEZE: Yes, ma'am.

20 COMMISSIONER PERRY: My first is how will this
21 discharge affect flow in the Plantent Creek?

22 MR. BREEZE: That's a really good question.
23 Frankly, in midsummer, right now that plant's discharging
24 about 1.2 million gallons a day. In midsummer, without the
25 plant, you can step across Plantent Creek. It's just a

0166

1 trickle of water, and that's downstream where it -- just
2 above the confluence with the Mississippi probably within
3 three or four hundred yards.

4 If there was no discharge from the plant into
5 the Plantent Creek, that is if you pipelined it by and put it
6 in the Mississippi River, you would actually have a situation
7 where Plantent Creek, which has other discharge to it,
8 wouldn't have enough water flow to -- to be satisfactory. So
9 the affect is most of the discharge in dry weather conditions
10 is from this plant. And I can't speak to the wet weather
11 conditions.

12 COMMISSIONER PERRY: My second question.

13 MR. BREEZE: Yes, ma'am.

14 COMMISSIONER PERRY: Why would anyone be
15 opposed to this?

16 MR. BREEZE: Frankly, I can't give you a good
17 answer to that, so we hope nobody will be opposed to it, if
18 you mean removing the pipeline request.

19 COMMISSIONER PERRY: Right.

20 MR. BREEZE: We can't see any benefit to it.
21 We understand at one point there was a reason for it. The
22 problem we have, ma'am, is that it may take an amendment or
23 some variation from the 208 plan, which is a federal -- it's
24 a different plan, and to get to the point where that can be
25 done is going to take some time. I can't speak to that, I

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1 haven't really investigated it.

2 I know that that's part of the process we're
3 going to be going through. In the meantime, we're going to
4 be operating a plant that is discharging to the Mississippi
5 and frankly is going to have to until there's some other
6 facility built. I mean, if there is to be a pipeline. So
7 no, I really can't speak to that. I see Kevin made his way
8 up here, he probably knows a lot about your need for answers,
9 too.

10 CHAIRMAN HERRMANN: You have our procedures
11 for requesting a variance?

12 MR. BREEZE: Yes, sir. Yes, sir. Again, we
13 haven't done it. We understand it's not in front of you.

14 There is a draft. We've been extremely involved with the
15 Department. They've been very helpful in allowing us to --
16 to understand the procedures and to deal with the things that
17 the process would have to say.

18 CHAIRMAN HERRMANN: For your ratification, a
19 208 plan was written from mid to late 80's.

20 MR. BREEZE: Thank you, sir.

21 MR. BREEZE: Was that a second phase of it, or
22 was that --

23 CHAIRMAN HERRMANN: No, that was it.

24 MR. BREEZE: And it says right on it for
25 Festus Crystal City pipeline to the Mississippi, it's

0168
1 actually in parentheses on an overview map of the plant.

2 CHAIRMAN HERRMANN: Yeah, the intent of the
3 208 plan was to get all of the discharges out of the internal
4 streams, meaning the Meramec and the Platent Creek and Cold
5 Water creek and all of the rest of them. And MSD St. Louis
6 has constructed out fall pipelines from Cold Water to the
7 river. They've removed all the rest of their discharges to
8 the internal creeks in accordance with the 208 plan.

9 MR. BREEZE: We understand that. And our
10 situation is a matter of scale plus considering where we're
11 discharging to. We think probably a different analysis would
12 apply.

13 CHAIRMAN HERRMANN: Okay.

14 MR. BREEZE: We would hope so.

15 CHAIRMAN HERRMANN: Good presentation for your
16 variance request.

17 MR. MOHAMMADI: Answer Commissioner Perry
18 question, the intent of 208 plan, as Commissioner -- Chairman
19 Herrmann explained it, was to transfer discharges --
20 discharges to all the small tributary stream to big rivers.
21 The reason behind that is the Missouri and Mississippi River,
22 because of what goes into it is not really healthy for
23 aquatic biological community. Smallest streams and creek are
24 used for biological communities, as a nursery, they come to
25 those streams for nursery. That's in addition to what

0169
1 Chairman Herrmann explained was intent of 208 plan.

2 COMMISSIONER PERRY: And so what this flow of,
3 um, 1.2 million gallons a day disturb that?

4 MR. MOHAMMADI: I'm not real prepared to
5 answer that question. I just wanted to answer earlier
6 question intent of 208 plan.

7 COMMISSIONER PERRY: Thank you.

8 CHAIRMAN HERRMANN: Something for Mr. Breeze's
9 presentation to consider.

10 MR. BREEZE: Thank you, sir.

11 CHAIRMAN HERRMANN: Thank you.

12 MR. BREEZE: I appreciate it.

13 CHAIRMAN HERRMANN: We have a request for
14 Diane Bernard to address the Commission. Yes, ma'am.

15 MS. BERNARD: Good afternoon, Commissioners.
16 Chairman Herrmann My name is Diane Bernard, and my
17 husband, Bobby, and we are very upset. We're here today to
18 acquaint you with the wastewater discharge situation on our

19 property in Callaway County, in the cedar creek water shed.
20 I'm sorry. I've been living with this for a very long time.
21 It distresses me, and I know that this is -- your intentions
22 are good when you talk about protecting the waters of the
23 state, and -- and I appreciate it.

24 I'm a taxpayer who is very concerned about the
25 welfare of life here in Missouri. I'm a nurse by profession,
0170

1 so care giving is part of my life. Our dilemma concerns the
2 Lake Breeze Estates subdivision lagoon sewer system, DNR file
3 MO0120995, that services 25 to 30 large residences, two
4 businesses, and probable future development of commercial
5 property. The lagoon operating permit expired June the 15th,
6 two thousand --

7 (End of Tape Three, Side One.)

8 MS. BERNARD: (Inaudible) is the developer of
9 the Lake Breeze Estates subdivision in Millersburg, Missouri.
10 We have had water issues on our property since the
11 subdivision was commenced. In other words, we had absolutely
12 no water issues on the property that is being affected by
13 discharge from the lagoon before 1997. There is a manmade
14 lake that is part of the subdivision development that
15 overflows directly in front of and beside the lagoon weir.
16 This is a three-tier lagoon.

17 Our observation is that this mixing of fresh
18 water with wastewater, because the fresh water overflows from
19 the manmade lake directly in front of the weir, is affecting
20 the quality of water flowing to our property, and the samples
21 of effluent standards testing. I have been told by various
22 staff members in many offices that I have been on the phone
23 to, e-mail, and letters, and face-to-face that the DNR
24 samples are meeting standards of the effluent that is being
25 sampled.

0171

1 At this time, I want to show you some pictures
2 of what is happening to our property as well as, by zoom
3 camera, pictures of the water that is coming out of the
4 lagoon weir. (Inaudible) if you will please review the
5 pictures provided, you'll see where the quality of water
6 leeching our property is at best questionable. We have many
7 concerns and questions. The actual discharge existence and
8 the quantity of discharges are not regulated in the state of
9 Missouri.

10 With all due respect, I have heard a lot just
11 with the limited amount of time that I've been here today,
12 that everyone is talking about quality. There is no
13 discussion whatsoever about quantity. This is so distressing
14 to us. We have heard for over one year from various members
15 of the government community, that they can do this to us,
16 meaning that anyone can create this type of hardship for a
17 neighbor, and I want to know why in 184 years of Missouri
18 statehood are there no statutes or regulations to prevent
19 discharge existence and quantity situations that affect the
20 possessory interest of private property owners in Missouri.

21 Why is a civil action that all I've heard
22 about for over a year required? That is the only way we can
23 address the developer, why we were not notified as immediate

24 downstream owners, even though this information has a section
25 on the DNR form that it, to me, I would assume that it would
0172 be required.

1
2 Only after we contacted the DNR in 2004, after
3 numerous calls to the county, health department, many other
4 offices I was directed to the Macon regional office. Why did
5 the -- why did, at that time, the DNR take the opportunity to
6 validate at the Callaway County courthouse that we were
7 indeed the downstream owners long after the construction and
8 the operating permits were granted.

9 Mr. Michael Wells, the Interim DNR Director,
10 on January 18th, 2005, acknowledged this fact in his letter
11 to us promising that we would, in the renewal process, be
12 notified as downstream owners, as did Mr. Michael Heeton
13 (phonetic), Environmental Specialist in Macon.

14 Additionally, I have counted over a dozen DNR
15 staff signatures and documents provided by the Macon regional
16 office concerning the Lake Breeze Estate lagoon construction
17 and permit processes. There is nowhere an indication that
18 anyone within the realm of the DNR, irrespective of the what
19 their job was, questioned where the unnamed creek was located
20 that would be the receiving gradient tributary for the
21 wastewater from the Lake Breeze Estates lagoon. Of course
22 the lake and lagoon weir is so close to our property line,
23 which is complicated by the fact that our actual property
24 line is four feet into the subdivision, past the existing
25 fence, identified by legal stakes.

0173
1 As I said, it is just appalling to us that no
2 one ever questioned where this unnamed creek would be that
3 the lagoon discharge was being directed to. I question you,
4 is there anyone sitting that is looking at these pictures
5 would you like this on your property? If there's no process
6 in place within the DNR to research or validate the area over
7 which wastewater travels, what do we do? What recourse do we
8 have?

9 And I'm not just talking for myself, I am also
10 here to try to help somebody who may not have the wherewithal
11 to defend themselves or to find solutions or to have somebody
12 to talk to and depend on, if they have a similar situation.
13 The fact that no one in the DNR questioned where the unnamed
14 creek was located and that it has -- it travels from the
15 weir, which is a few feet from our property line, over our
16 property into the mouth of the unnamed creek, which isn't
17 really that far, but it has totally cut our access off to the
18 northwest part of our property. And in the process, grants
19 construction and operating permits. And the fact that the
20 signatures on these permits for the Lake Breeze subdivision
21 has totally and potentially permanently affected the use and
22 enjoyment of our property.

23 We intend to oppose any renewals to the
24 operating permit for Lake Breeze Estate water -- wastewater
25 lagoon. It was granted June 16th, 2000; it expired June

0174
1 15th, 2005. The renewal process is at an impasse because of
2 the parties involved with the Lake Breeze Estates

3 subdivision. I will be giving you some handouts so that at a
4 time more favorable to your -- this timeline here, because I
5 understand everybody wants to go -- you can review for
6 yourself exactly who the principle parties are.

7 There are several violations on file, and
8 frankly, it's interesting to me that I was the one that
9 actually created the existence of them because with my phone
10 calls, and my insistence, inspections were made to the
11 lagoon. I have been in contact with Danny Moore, the
12 Missouri State Legislative Assembly individual for Callaway
13 County. I have sent a huge letter, a huge letter, to various
14 legislative officials, Attorney General Jay Nixon, state
15 Senator Carol Vogel (phonetic), State Representative Danny
16 Moore, US Senator Christopher S. Bond, US Senator James M.
17 Talent, US Representative Kenny Hulshof, and Mr. Steve Glove,
18 Commissioner.

19 Now, I recognize that some of these are
20 actually federal officials, elected officials, but concerning
21 the fact that I have been given such a dramatic runaround, no
22 one wants to accept responsibility within the government for
23 what has occurred to us, the DNR. I have called the Corps of
24 Engineers and they have no jurisdiction because the lagoon
25 was not built on a designated tributary river or lake, so I

0175

1 have become extremely anxious because I honestly don't
2 believe that a lawsuit is always the way to go. If we have
3 to do it, we will.

4 The question is who do we sue? Do we sue
5 everybody, including the DNR because the DNR is supposed to
6 be taking care of the interests of the public as a result of
7 controlling the waters of Missouri? Do I only have the
8 option of suing the developer? And granted, I understand
9 that none of you can give me counsel on that, but I have
10 lived and breathed this for so long that I do not know how
11 people deal with it, if they have nowhere to go, except a
12 lawsuit.

13 CHAIRMAN HERRMANN: May I ask a few questions
14 for clarification? You said the permit expired June 15th,
15 '05?

16 MS. BERNARD: Yes, sir.

17 CHAIRMAN HERRMANN: What's the status?

18 MS. BERNARD: May I give you the at this
19 point?

20 MR. GALBERRAITH: I don't know in particular what
21 the status of the permit is, Mr. Chairman.

22 CHAIRMAN HERRMANN: Kevin sneaked out on us.

23 MS. BERNARD: The violations -- the violations
24 are contained at --

25

0176

1 would surmise that we've held up on reissuing lagoon permits
2 for the reasons discussed before that we're trying to resolve
3 these issues with the stream studies.

4 CHAIRMAN HERRMANN: Okay.

5 MR. GALBRAITH: It would be a likely possibility,
6 but I don't know in particular here.

7 MS. BERNARD: May I address that, please?

8 CHAIRMAN HERRMANN: Yes, ma'am.
9 MS. BERNARD: The developer, Four Star, Inc.,
10 did not follow the 180-day permit renewal time limit. They
11 knew that the permit was going to expire June the 15th.
12 Mr. Heeton, at the Macon regional office, indicated to me
13 that they sent the renewal in June 2. 13 days.
14 CHAIRMAN HERRMANN: They being the developer?
15 MS. BERNARD: Yes, sir.
16 CHAIRMAN HERRMANN: Okay.
17 MS. BERNARD: Sorry. Shirley Bright.
18 Thirteen days before the expiration. In the meantime, they
19 knew they had a set of violations that they needed to take
20 care of, which were not complete by even the time that the
21 permit expired. In any event, June 2, and I only have the
22 written word from the DNR, I do not have the documents that
23 went with it, but when Four Star, Inc. submitted the renewal
24 application late, of course, they did not list us as the
25 downstream owners, even though they know that we are.

0177

1 My husband several years ago confronted
2 Mr. Bright, and he said oh, that water is clean enough to
3 drink, and he walked off and wouldn't even talk to us. And
4 the second issue was that in this renewal permit, the number
5 of residences were not adequately defined. And for those two
6 primary reasons, the DNR Macon office returned the
7 application to Four Star.

8 As of my last conversation with Mr. Heeton,
9 there was no satisfactory renewal accepted. And apparently,
10 there are some disagreements within the subdivision. The
11 Lake Breeze Subdivision Homeowner's Association, the second
12 one, actually, that's recorded, or at least formed, I
13 couldn't find the record with the Secretary of State's
14 website on the first one, but on the second one, the second
15 one was -- was formed this July -- this past July, 2005.

16 In August of 2005, the president of the new
17 homeowner's association contacted the Macon regional office
18 wanting to know whether or not they should -- they should
19 have any interest as being a continuing authority because
20 they wanted to be sure that everything was okay with the
21 lagoon. They had no knowledge. As soon as they had the
22 homeowner's association formed, all of a sudden there's no
23 discussions between the developer, Four Star, Inc., where
24 incidentally, if you look at some of the maps I have there,
25 the -- the lots, the residential lots are developed, and

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1 there are home -- existing homes, large homes, and there just
2 seems to be people planting their feet and not coming
3 forward, and trying to get this permit situation under
4 control over in the subdivision.

5 To make a long story short, I met with
6 Mr. Todd Iverson (phonetic) yesterday at the Attorney
7 General's office. I had -- I gave him everything that I have
8 that the DNR permitted me to have, including the additional
9 research that I have done. So sir, it is not because there
10 is a back log of any kind that has affected this particular
11 instance. It is because there is -- there is reluctance or
12 inability or whatever the reasons are for the parties

13 involved that there is no renewal process that is
14 satisfactory to the DNR Macon office.

15 Now, I have been in contact with the media,
16 the Fulton Sun, TV 8, KOMU, NBC affiliate in Columbia,
17 Missouri, as well as others who may or may not contact me. I
18 am very serious, totally serious about bringing this to the
19 public forefront because I want to be involved in helping the
20 state citizens. This cannot go on.

21 CHAIRMAN HERRMANN: Kevin, or perhaps Ed, do
22 you know to whom the permit is issued, the one that's
23 expired?

24 MR. MOHAMMADI: Mr. Chairman, this is first
25 time I hear -- I heard of this.

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1 MS. BERNARD: I have it. I have it. I have
2 it, sir.

3 CHAIRMAN HERRMANN: Okay. You don't have any
4 notice of violations issued?

5 MR. MOHAMMADI: We -- I'm sorry, just. We
6 have the name of the owner the NOV was issued. Ma'am, let me
7 move this over here.

8 MS. BERNARD: I'm sorry. Yes, of course.

9 MR. MOHAMMADI: The name of the owner is
10 Shirley Bright.

11 CHAIRMAN HERRMANN: Okay.

12 MR. MOHAMMADI: That's the name on the notice
13 of violation that was issued by the Department, December,
14 2004.

15 CHAIRMAN HERRMANN: One notice of violation?

16 MR. GALBRAITH: Two.

17 MR. MOHAMMADI: And that's according to the
18 record I'm reading as it was handed to me.

19 MR. GALBRAITH: We're all just getting this for
20 the first time, Mr. Chairman, but apparently there was a
21 follow-up NOV June 13th, 2005, from the regional office in
22 Macon, and that's as far as I've gotten in the packet here.

23 MS. BERNARD: Commissioner. I'm sorry, sir,
24 go ahead.

25 MR. MOHAMMADI: Mr. Chairman, if you'd like

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1 to, I'd be glad to look into this and report back to you both
2 by writing, or even through electronic mail.

3 CHAIRMAN HERRMANN: That's where I was going
4 to fully investigate it, perhaps get some relief for these
5 people, if it's necessary and warranted, and also to bring
6 the owner or the operator up-to-date in his permit
7 requirements and also his compliance requirements.

8 MR. MOHAMMADI: We'd be glad to, and we can
9 provide you a report in next Commission meeting.

10 CHAIRMAN HERRMANN: I think that would be very
11 appropriate. So there will be no -- all of the allegations,
12 all of the circumstances, and all the people involved, and if
13 there are impediments to issuing a valid operating permit, we
14 should also know that.

15 MR. MOHAMMADI: We will do that.

16 CHAIRMAN HERRMANN: Okay. Thank you.

17 MS. BERNARD: Can I answer your questions?

18 CHAIRMAN HERRMANN: Yes, ma'am.
19 MS. BERNARD: You asked to whom the permit was
20 granted. On -- on -- it was revised August the 24th, stamped
21 August the 27th, 2001, but the effective date was actually
22 June 16th, 2000. This is signed by Stephen Mahfood, at that
23 time, the director of the DNR. The cover letter was sent
24 August the 24th, 2001, to the Lake Breeze Subdivision
25 Association with the address given as 1695 County Road 342,
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1 Fulton, and the letter is signed by the Water Pollution
2 Control Program, and with all due respect, sir, signed by
3 Phillip A. Schroeder, chief permits section with a copy to
4 Jefferson city regional office, Sheila Lage, WPCP. I have --
5 CHAIRMAN HERRMANN: To bring us up-to-date,
6 I'm interested in who is the responsible party to whom a
7 renewal may be considered or granted. As you made reference
8 to the homeowner's association now as perhaps being the
9 operating authority.
10 MS. BERNARD: But they will not -- sir, they
11 will not grant that permission to the DNR office in Macon as
12 being the continuing authority because when they found out in
13 August of 2005, all the information in the file, they stated
14 this is a nightmare, and they had a community meeting in the
15 subdivision and apparently there are other issues also.
16 The -- and I have this knowledge because a homeowner in the
17 subdivision called me and told me that the money that has
18 been given over per month to the sewer maintenance company
19 has evaporated. There is no money there.
20 CHAIRMAN HERRMANN: Okay. Well, I'd like to
21 have, with your permission, Ed, Mr. Mohammadi to investigate
22 it, probably even talk to you to get some more detail.
23 MS. BERNARD: That would be just fine.
24 CHAIRMAN HERRMANN: If necessary. I'm sure he
25 has your address; if not, it's on the card.
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1 MS. BERNARD: Yes, sir. And frankly if I may
2 submit this, I talked to Debbie -- no, Daniella Helperd
3 (phonetic), Daniella Helperd, Daniella Helperd at the
4 Missouri Environment Department, and she forwarded my
5 information to the ombudsman. Is it Scott Totten? I'm not
6 sure if I have the correct name.
7 CHAIRMAN HERRMANN: Yes.
8 MS. BERNARD: And I'm, you know, I'm in
9 contact with as many people as I possibly can because I'm not
10 going to stop. And I will see you in two months, sir.
11 CHAIRMAN HERRMANN: Okay. The only way we can
12 intelligently give you any assistance is to have it
13 investigated and get all the circumstances.
14 MS. BERNARD: Well, and if you would, I'm not
15 quite sure just exactly what your jurisdiction is, but
16 Mr. Iverson and an investigator are looking into it, and
17 Mr. Iverson said he would get back to me by January the 17th
18 or I could call him, so ...
19 MR. BRYAN: We'll be in touch with you next
20 week.
21 MS. BERNARD: So I really appreciate it.
22 Thank you, Mr. Bryan.

23 CHAIRMAN HERRMANN: Thank you.
24 MS. BERNARD: Thank you. I apologize for my
25 emotional state, but I think you would feel the same way if
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1 you didn't know what to do.
2 CHAIRMAN HERRMANN: Yes, ma'am.
3 MS. BERNARD: I appreciate it. Thank you.
4 CHAIRMAN HERRMANN: Thank you. And anything
5 else to bring before the Commission? Hearing nothing, we'll
6 declare this meeting adjourned.
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1 C E R T I F I C A T E
2 STATE OF MISSOURI)
3) ss:
4 COUNTY OF GASCONADE)
5 I, Jennifer L. Leibach, Registered
6 Professional Reporter, Certified Court Reporter, CCR #1780,
7 and Notary Public within and for the State of Missouri, do
8 hereby certify that I was not personally present at the
9 proceedings had in the above-entitled cause at the time and
10 place set forth in the caption sheet thereof; that I took
11 down from audio tape in Stenotype the proceedings had; and
12 that the foregoing is a full, true, and correct transcript of
13 such Stenotype notes so made at such time and place to the
14 best of my ability.
15 Given at the City of Jefferson, County of
16 Cole, State of Missouri, this 20th day of January.
17
18
19 _____
JENNIFER L. LEIBACH, RPR, CCR

Respectfully Submitted,

Edward Galbraith
Director of Staff